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N. 2912

No. 14529

United States
Court of Appeals
for the Ninth Circuit

MATANUSKA VALLEY LINES, INC., a Corporation,

Appellant.

VS.

DOROTHY NEAL and NATHANIEL NEAL, Jr.,

Appellees.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 50)

Appeal from the United States District Court
for the District of Alaska,
Third Division

FILED

MAR 10 1955

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PAUL P. O'BRIEN,
CLERK

No. 14529

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Court of Appeals**
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MATANUSKA VALLEY LINES, INC., a Corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Third Division

No. A-8214

DOROTHY NEAL and NATHANIEL NEAL,
JR.,

Plaintiffs,

vs.

MATANUSKA VALLEY LINES, INC., a Corporation, and JOHN DOE WILLIAMS and LOIS WILLIAMS,

Defendants.

COMPLAINT

The plaintiffs complain of the defendants and for cause of action allege:

I.

That the plaintiffs, Dorothy Neal and Nathaniel Neal, Jr., are now, and were at all times mentioned herein, husband and wife.

II.

That the defendant, Matanuska Valley Lines, Inc., is now, and was at all times mentioned herein, a corporation created and existing under the laws of the Territory of Alaska, with its principal office in the City of Anchorage, and does now, and did at all times mentioned herein, own and operate a system of motor buses in and around the City of Anchorage, Territory of Alaska, and particularly

operated such motor buses on East "G" or Gambell Street in and near the said City of Anchorage.

III.

That on the 20th day of November, 1951, the defendant, John Doe Williams, whose correct first name is unknown to plaintiffs, was the owner of a truck type vehicle which was being operated on and along the said East "G" or Gambell Street by the defendant, Lois Williams.

IV.

That on the said date, to wit, the 20th day of November, 1951, the plaintiff, Dorothy Neal, was riding as a fare-paying passenger in one of the motor buses owned and operated by the said defendant, Matanuska Valley Lines, Inc., as a common carrier of passengers for hire, upon and along the said East "G" or Gambell Street at a point on the said East "G" or Gambell Street between 15th Avenue and Fireweed Lane, and while the said motor bus in which she was so riding was travelling northerly toward the City of Anchorage, the same was driven and operated so recklessly and negligently, and the truck being driven by the defendant, Lois Williams, in a southerly direction was so negligently and recklessly then and there operated, that the said motor bus and said truck collided one with the other, and the plaintiff, Dorothy Neal, was injured as hereinafter set out.

V.

That the said motor bus, in which the plaintiff, Dorothy Neal, was riding as aforesaid, was oper-

ated and driven by an agent and servant of the said defendant, Matanuska Valley Lines, Inc., and who was working within the scope of her employment and agency, to wit, in the driving and operation of said bus at said time and place.

VI.

That in said collision, caused by the joint, concurrent and contemporaneous gross recklessness and negligence of the defendants, and each of them, the plaintiff, Dorothy Neal, was seriously and permanently injured in her health, strength and activity; that the bones of her right arm were broken and shattered so seriously as to result in a crippled and misshapen limb; that the bones of her right leg were broken and shattered and the bones of her pelvis were separated and broken resulting in a permanently weakened right leg which is now more than one inch shorter than the other leg and is so crippled that she can move only with great pain and in a limping manner; that she received a profound shock to her nervous system and a bruising, straining and spraining of her muscles, ligaments and tendons; that as a result of the long confinement and the aforesaid shock and injuries she contracted tuberculosis and is now, and will be for a long time, confined to a tuberculosis sanatorium for the treatment of this disease; that said injuries are permanent; that from said injuries plaintiff, Dorothy Neal, has suffered great physical pain and mental anguish and will continue to suffer such pain and anguish; that at the time of the collision

aforesaid, plaintiff, Dorothy Neal, was then pregnant, and was put in great fear for the health and welfare of her unborn child and was forced to carry said child to delivery while in great pain and suffering and confined to the hospital for treatment of her injuries; and by reason of her tubercular condition has been separated from her child and will continue to be so separated for a period of more than a year; all to the damage of the plaintiffs in the sum of \$150,000.00.

VII.

That by reason of said injuries to the plaintiff, Dorothy Neal, it was necessary for the plaintiff, Nathaniel Neal, Jr., to employ physicians and surgeons to treat his wife for which he has incurred reasonable and necessary bills totalling more than \$1,750.00; that likewise, by reason of said injuries it was necessary for the plaintiff, Nathaniel Neal, Jr., to incur a reasonable and necessary hospital bill in the total amount of \$2,393.65, together with other reasonable and necessary charges and expenses in and about the care of the plaintiff, Dorothy Neal, in the total sum of \$2,642.93; all to the damage of the plaintiff, Nathaniel Neal, Jr., in the total sum of \$6,786.58; that plaintiff, Nathaniel Neal, Jr., will be forced to incur further additional medical and hospital expense in an amount unknown.

VIII.

Solely by reason of the said injuries and nervous shock and resultant sick and diseased condition the

said plaintiff, Dorothy Neal, at all times since the infliction of said injuries has been and will permanently continue to be disabled, nervous, sick and lame, and the plaintiff, Nathaniel Neal, Jr., has thereby totally lost the consort, companionship, society and affection of his said wife, the plaintiff, Dorothy Neal; that prior to the said accident the plaintiff, Dorothy Neal, was a healthy and able-bodied woman and was able to care for the household of herself and her husband and perform the usual household duties; that further, the plaintiff, Dorothy Neal, was able to work for others as household help and was capable of earning, and did earn approximately \$400.00 per month in the performance of such duties; that since said accident she has been unable to perform her household duties or work for others and will be unable, in the future, to ever perform said duties again; all to the damages of the plaintiff, Nathaniel Neal, Jr., in the sum of \$75,000.00.

Wherefore, the plaintiff, Dorothy Neal, prays judgment against the defendants for the sum of \$150,000.00 in damages; and the plaintiff, Nathaniel Neal, Jr., prays judgment against the defendants in the sum of \$81,786.58 in damages, and for costs of this action, a reasonable attorney's fee and all other proper relief.

/s/ WENDELL P. KAY,

Of Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed November 14, 1952.

the statements therein contained, leaving the plaintiffs to a proof thereof.

VIII.

The defendant is without knowledge sufficient to form a belief as to the truth of allegations in Paragraph VIII of Plaintiffs' Complaint, therefore deny the statements therein contained, leaving the plaintiffs to a proof thereof.

Affirmative Defenses

In Further Answer to plaintiffs' Complaint the defendant lists the following Affirmative Defense and specifically alleges as follows:

I.

The defendant alleges that the co-defendant, Lois Williams, by her gross negligence and her drunken condition, caused the injuries, if any, to the plaintiffs, all without any fault or contribution of the defendant, Matanuska Valley Lines, Inc.

II.

That the co-defendant, Lois Williams, was so negligent, careless, reckless, and drunk in her driving in a southerly direction on East "G" or Gambell Street that she failed to properly negotiate a turn to her right and due to her speed, which was beyond the legal number of miles per hour, said Lois Williams came over onto the wrong side of said East "G" or Gambell Street and struck the Matanuska Valley Lines, Inc., bus and tore into the entire left side of said bus, ripping it apart from the front end of said bus to the rear end, thereby totally destroying the value of said unit in addition to causing

bodily injuries to all of the said passengers and driver of said bus.

III.

The accident herein referred to occurred initially on the East one-half ($E\frac{1}{2}$) side of the road referred to herein as "East 'G' or Gambell Street." This side of said roadway or street was properly occupied by the co-defendant, Matanuska Valley Lines, Inc., bus.

Any allegation alleged against the defendant Matanuska Valley Lines, Inc., which has not been specifically denied herein is categorically denied, leaving the plaintiffs to a strict proof thereof.

Wherefore, having fully answered plaintiffs' Complaint, the defendant, Matanuska Valley Lines, Inc., pray that the plaintiffs take nothing thereby and that the defendant have and recover of and from the plaintiffs the cost of suit herein incurred, including a reasonable attorney's fee and for such other and further relief as may seem meet and proper in the premises.

MATANUSKA VALLEY
LINES, INC.,

By /s/ RUSSELL SWANK,
President.

/s/ R. H. COTTIS, for

HELLENTHAL, HELLEN-
THAL & COTTIS,

Attorneys for Defendant Mat-
anuska Valley Lines, Inc.

DEMAND FOR JURY TRIAL

Demand is hereby made for a trial by jury of the above-entitled action for those issues so triable.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed December 8, 1952.

[Title of District Court and Cause.]

No. A-8214

SEPARATE ANSWER OF DEFENDANTS,
MILTON T. WILLIAMS and LOIS WILLIAMS

Come now the above-named defendants, Milton T. Williams and Lois Williams, by and through their attorneys, Plummer & Arnell, and by way of answer to the plaintiffs' complaint, admit, deny and allege as follows:

I.

Defendants are without knowledge to form a belief as to the allegations contained in Paragraphs I and II of plaintiffs' complaint, and they, therefore, deny each and every allegation therein contained.

II.

Defendants admit the allegation contained in Paragraph III of plaintiffs' complaint.

III.

Defendants are without knowledge sufficient to form a belief as to the allegations contained in Paragraph IV of plaintiffs' complaint and they,

therefore, deny the same; defendants further specifically deny that the truck, being driven by the defendant, Lois Williams, in a southerly direction, was being operated negligently or carelessly.

IV.

Defendants are without knowledge sufficient to form a belief as to the allegations contained in Paragraph V of plaintiffs' complaint and they, therefore, deny each and every allegation therein contained.

V.

Defendants deny each and every allegation contained in Paragraph VI, VII and VIII of plaintiffs' complaint.

As a further Answer to plaintiffs' complaint, and by way of an Affirmative Defense thereto the defendants, Milton T. Williams and Lois Williams, alleges as follows:

I.

That, if in fact, on the 20th day of November, 1951, the plaintiff, Dorothy Neal, met with an accident and the plaintiffs sustained the damages alleged in their complaint, said accident was caused and said injuries were sustained solely by reason of the negligence of the defendant, Matanuska Valley Lines, Inc.

Wherefore, having fully answered plaintiffs' complaint, defendants pray that the plaintiffs take nothing thereby and that the defendants have and recover of plaintiffs their costs and disbursements

in this action incurred, including a reasonable attorney's fee to be fixed by the Court.

PLUMMER & ARNELL,

By /s/ RAYMOND E. PLUMMER,
Attorneys for Defendants, Milton T. Williams and
Lois Williams.

Receipt of copy acknowledged.

[Endorsed]: Filed January 7, 1953.

[Title of District Court and Cause.]

No. A-8214

OBJECTIONS TO PROPOSED JUDGMENT

The defendant, Matanuska Valley Lines, Inc., objects to the proposed judgment herein for the following reasons:

1. A separate judgment should be entered in each case since the cases were "consolidated" only for the purposes of trial;
2. For the reasons set forth in its motion to set aside verdict or for a new trial.

Dated at Anchorage, Alaska, this 13th day of October, 1953.

/s/ RALPH H. COTTIS, of
HELLENTHAL, HELLEN-
THAL & COTTIS,
Attorneys for the Defendant, Matanuska Valley
Lines, Inc.

Service of copy acknowledged.

[Endorsed]: Filed October 13, 1953.

In the U. S. District Court for the District of
Alaska, Division Number Three, at Anchorage

No. A-8214

DOROTHY NEAL and NATHANIEL NEAL,
JR.,

Plaintiffs,

vs.

MATANUSKA VALLEY LINES, INC., a Cor-
poration, and JOHN DOE WILLIAMS and
LOIS WILLIAMS,

Defendants.

No. A-8413

BLANCHE THOMAS,

Plaintiff,

vs.

MATANUSKA VALLEY LINES, INC., a Cor-
poration, and JOHN DOE WILLIAMS and
LOIS WILLIAMS,

Defendants.

No. A-8666

WORDIE FRAZIER and PRINCE FRAZIER,
Plaintiffs,

vs.

MATANUSKA VALLEY LINES, INC., a Cor-
poration, and JOHN DOE WILLIAMS and
LOIS WILLIAMS,

Defendants.

JUDGMENT

These Actions, first having been consolidated, having been regularly placed upon the calendar for trial, and having been reached for trial on the 15th day of September, 1953, the above-named plaintiffs, appearing by their attorneys, Wendell P. Kay, Herald Stringer, John Connolly and J. Earl Cooper, and the above-named defendant, Matanuska Valley Lines, Inc., appearing by its attorneys, Ralph Cottis and Evander C. Smith, and the above-named defendants, John Doe Williams, properly known as Milton T. Williams and Lois Williams, appearing by their attorneys, Raymond E. Plummer and Burton Biss, a jury of twelve persons was regularly impanelled to try said actions and witnesses on the part of the plaintiffs and the defendants were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider their verdict and subsequently returned into Court on the 24th day of September, 1953, and returned into open Court the following-numbered verdicts to wit.

Verdict No. I.

We, the Jury, duly impanelled and sworn to try the above-entitled cause, find as follows:

For the Plaintiff, Dorothy Neal, against both defendants in the sum of \$75,000.00.

Dated at Anchorage, Alaska, this 24th day of Sept., 1953.

/s/ A. L. ENGEBRETH,
Foreman.

Verdict No. II.

We, the Jury, duly impanelled and sworn to try the above-entitled cause, find as follows:

For the Plaintiff, Nathaniel Neal, Jr., against both defendants in the sum of \$17,500.00.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

A. L. ENGEBRETH,
Foreman.

Verdict No. III.

We, the Jury, duly impanelled and sworn to try the above-entitled cause, find as follows:

For the Plaintiff, Wordie Frazier, against both defendants in the sum of \$5,000.00.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

A. L. ENGEBRETH,
Foreman.

Verdict No. IV.

We, the Jury, duly impanelled and sworn to try the above-entitled cause, find as follows:

For the Plaintiff, Prince Frazier, against both defendants in the sum of \$3,500.00.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

A. L. ENGEBRETH,
Foreman.

Verdict No. V.

We, the Jury, duly impanelled and sworn to try the above-entitled cause, find as follows:

For the Plaintiff, Blanche Thomas, against both defendants in the sum of \$500.00.

Dated at Anchorage, Alaska, this 24th day of September, 1953.

A. L. ENGEBRETH,
Foreman.

Whereupon, at the request of the attorneys for the defendants, each member of the jury was polled and responded that the above verdicts were their verdicts, respectively.

Therefore, it is Considered and Adjudged by the Court that the said Plaintiff, Dorothy Neal, do have and recover of and from the said defendants, Matanuska Valley Lines, Inc., and Lois Williams, or either of them, the sum of \$75,000.00; that the said Plaintiff, Nathaniel Neal, Jr., do have and recover of and from the said defendants, Matanuska Valley Lines, Inc., and Lois Williams, or either of them, the sum of \$17,500.00; that the said Plaintiff, Wordie Frazier, do have and recover of and from the said defendants, Matanuska Valley Lines, Inc., and Lois Williams, or either of them, the sum of \$5,000.00; that the said Plaintiff, Prince Frazier, do have and recover of and from the said defendants, Matanuska Valley Lines, Inc., and Lois Williams, or either of them, the sum of \$3,500.00; that the said Plaintiff, Blanche Thomas, do have and recover of and from the said defendants, Matanuska

Valley Lines, Inc., and Lois Williams, or either of them, the sum of \$500.00; and that the said named Plaintiffs recover the further total sum of \$1,845 as attorneys' fees in these causes, together with costs taxed at \$276.70, and hereof let execution issue.

Dated this 12th day of October, 1953.

/s/ GEORGE W. FOLTA,

Judge of the District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered October 14, 1953.

[Title of District Court and Cause.]

No. A-8214

MOTION FOR REVISION

The defendant, Matanuska Valley Lines, Inc., moves that the judgment in this action be revised or vacated for failure to comply with Rule 54(b) of the Rules of Civil Procedure.

This motion is predicated upon the records and files herein.

Dated at Anchorage, Alaska, this 23d day of October, 1953.

/s/ R. H. COTTIS, of

HELLENTHAL, HELLENTHAL & COTTIS,

Attorneys for Defendant Matanuska Valley Lines, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed October 23, 1953.

In the U. S. District Court for the District of Alaska,
Division Number Three at Anchorage

Consolidated Cases Nos. A-8214, A-8413, and A-8666

DOROTHY NEAL, et al.,

Plaintiffs,

vs.

MATANUSKA VALLEY LINES, INC., a Corporation, et al.,

Defendants.

MOTION TO SET ASIDE VERDICT AND ANY
JUDGMENT ENTERED THEREON OR, IN
THE ALTERNATIVE MOTION FOR A
NEW TRIAL

The defendants in the above actions by their respective attorneys move the court in accordance with Rule 50 of the Rules of Civil Procedure that verdicts numbered 1, 2, 3, 4, and 5, and any judgment which may have been entered upon such verdicts, be set aside and that they have judgment entered in accordance with their respective motions for directed verdicts which were made at the close of all the evidence herein.

The said defendants in the alternative respectively move the court that the said verdicts and any judgment entered thereon be set aside and a new trial granted.

The grounds for these motions are made on behalf

of each of the defendants separately and are as follows:

1. The absence of evidence sufficient to support the verdicts.

2. The verdicts are contrary to the clear weight of the evidence.

3. Irregularity in the proceedings by which the defendants were prevented from having a fair trial in that the defendants were denied more than a total of three peremptory challenges for all three defendants and in that the trial was conducted in an atmosphere of haste.

4. The damages awarded are excessive and appear to have been given under the influence of passion or prejudice.

5. Various errors of law occurred at the trial and were excepted to, such errors including the admission in evidence of Dr. Starr's deposition without any showing that the deponent was not available for the trial; instructions 6, 8, 14, 15, 17, 18 and the forms of verdict 1, 2, 3, 4, and 5.

6. Cause A-8413 was forced to trial before it was at issue and arguments over the matter in court may have influenced the jury by leading it to believe that the defendants were reluctant to have the causes come to trial.

7. Trial of the cases was compelled although none of them was at issue with respect to the cross-

complaint of Matanuska Valley Lines, Inc., against the other defendants.

8. The jury failed to return either verdict number 6 or verdict number 7.

These motions are predicated upon the records, files, proceedings and evidence herein.

Dated at Anchorage, Alaska, this 5th day of October, 1953.

MATANUSKA VALLEY
LINES, INC.,

By /s/ RALPH H. COTTIS, of
HELLENTHAL, HELLENTHAL
& COTTIS,

By /s/ EVANDER CADE SMITH,
Its Attorneys.

JOHN DOE WILLIAMS and
LOIS WILLIAMS,

By /s/ RAYMOND E. PLUMMER,
Their Attorney.

Service of copy acknowledged.

[Endorsed]: Filed October 5, 1953.

[Title of District Court and Cause.]

No. A-8214

SUPPLEMENTARY MOTION FOR NEW
TRIAL OR IN ALTERNATIVE TO SET
ASIDÉ JUDGMENT OR IN ALTERNA-
TIVE TO REDUCE AMOUNTS OF VER-
DICTS

The defendant, Matanuska Valley Lines, Inc., moves in the alternative that the judgment herein be set aside or that a new trial be granted or that the amount of the verdicts be reduced.

This motion is based on the attached affidavit of Bruce Groseclose and the records and files herein.

Dated at Anchorage, Alaska, this 23d day of October, 1953.

/s/ R. H. COTTIS, of
HELLENTHAL, HELLEN-
THAL & COTTIS,
Attorneys for Defendant Mat-
anuska Valley Lines, Inc.

Affidavit

United States of America,
Territory of Alaska—ss.

I, Bruce B. Groseclose, being first duly sworn on oath, depose and say:

That I am one of the members of the Jury that

was duly impaneled and tried the cases of Neal, et al., vs. Matanuska Valley Bus Lines, et al.;

That this Affidavit is made voluntarily and without compensation or expectation of compensation to inform the attorneys for Matanuska Valley Bus Lines of information which they have sought out concerning certain remarks and procedures used in the deliberations by the Jury in the above-named cause.

We said that we knew the lawyers would get part of the amounts awarded if it was awarded and that in order for the plaintiffs to have anything left to pay their bills, hospital, etc., there would have to be added amounts for the lawyers. We did not know what the amount for the lawyers was. There was some discussion about how much the usual amount was Outside and so forth. One of the jurors had worked in a lawyer's office in Portland, and she knew what it was there, but we had no way of knowing here and it was none of our business. This woman said it was 50 per cent in Portland. Neal had the largest hospital bill, and we knew how much that was from evidence and so we said for him to have enough to pay that bill we will have to add some for the lawyers and their take so there would be enough for him to pay his bills. We knew it was out of our line and we had no reason to assume that.

There was not unanimity for quite a while as to whether the bus company could be held liable or not. Then someone got the Judge's instructions

again and read that the law was that if a person were driving down the road and saw a car coming on the other side—so they were going to meet the car—even though the car was going at an excessive rate of speed that they might assume that that car would stay on its side of the road and pass safely unless they should be able to see that the road conditions or the erratic manner in which the person were driving or something could cause an accident and in that case they should do something different than keep on proceeding down the road.

It was at that point that the whole matter hinged on whether the bus company were liable or not. We were sure that the bus driver had not seen the possibility of danger, but the question was should she have seen, knowing the condition of the road at the turn and the fact that the truck was coming at an excessive rate of speed, as she testified. We decided that she could have at least anticipated trouble and it was at that point that the whole matter hinged. If it was not “should” then the bus company would have had no liability, and so it is at that fine point between “could” and “should”—if she should have been able to anticipate trouble, then the bus company would have been liable, or if it was a matter of “could” then it was different. So the jury found that she “should have anticipated trouble.”

We said let us assume that each of them was going 20 miles an hour, then they would be arriving at a given point at the rate of 40 miles an hour, and somebody figured out that it was from the time the

bus driver said she saw the truck driver—there were several testimonies—she changed it—we decided that she wasn't able to judge distance in feet. We disregarded her statements about distance in feet. From where we could assume the distance was, it would have taken two and a half ($2\frac{1}{2}$) seconds to stop if road conditions had been good.

In Witness Whereof, I have hereunto set my hand and seal this 21st day of October, 1953.

/s/ BRUCE B. GROSECLOSE.

Subscribed and Sworn to before me this 22d day of October, 1953.

[Seal] /s/ FRANCES RAY,
Notary Public for Alaska.

My commission expires: 12/11/56.

Service of copy acknowledged.

[Endorsed]: Filed October 23, 1953.

[Title of District Court and Cause.]

No. A-8214

NOTICE OF APPEAL

Notice is hereby given that Matanuska Valley Lines, Inc., the defendants above named, hereby appeals to the United States Court of Appeals for the

Ninth Circuit from the final judgment entered in this action on the 1st day of October, 1953.

/s/ RALPH H. COTTIS, of
HELLENTHAL, HELLEN-
THAL & COTTIS,
Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed February 27, 1954.

[Title of District Court and Cause.]

No. A-8214

SUPERSEDEAS BOND

Know All Men By These Presents, that Matanuska Valley Lines, Inc., as principal, and the undersigned as sureties, are held and firmly bound unto the plaintiff Dorothy Neal in the sum of Seventy Thousand Dollars (\$70,000.00) and to the plaintiff Nathaniel Neal, Jr., in the sum of Ten Thousand Dollars (\$10,000.00).

The condition of this Bond is that if the Judgment in full herein be satisfied, together with costs, interest and damages for delay if for any reason the appeal heretofore taken in this cause be dismissed; or if the Judgment be affirmed or modified and as affirmed or modified be satisfied in full together with such costs, interest and damages as the United States Court of Appeals for the Ninth Circuit may adjudge and award then this Bond shall be null and void; otherwise to remain in full force and effect.

And Know All Men Further By These Presents that the undersigned as sureties severally submit themselves to the jurisdiction of the United States District Court for the Third Judicial Division of Alaska and irrevocably appoint the Clerk of said Court as their respective agents upon whom any papers affecting their liability on this Bond may be served. And the undersigned sureties agree that their respective liability may be enforced on motion without the necessity of an independent action, the motion and such notice of the motion as the Court prescribes to be served on the Clerk of the Court who shall forthwith mail copies to the undersigned sureties if their respective addresses be known.

Each of the undersigned sureties limits his liability hereunder to the amount appearing after his signature.

Witness our hands and seals this 9th day of April, 1954.

MATANUSKA VALLEY
LINES, INC.,

By /s/ RUSSELL SWANK,
Principal.

Name	Amount
/s/ E. H. OLING Surety.	\$5,000.00
/s/ JOE PACKARD Surety.	\$5,000.00

Name	Amount
/s/ RUSSELL SWANK Surety.	\$5,000.00
/s/ LEWIS E. SIMPSIN Surety.	\$2,500.00
/s/ LOUIS ODSATHER Surety.	\$2,500.00
/s/ MORMAN G. LANGE Surety.	\$5,000.00
/s/ J. A. COLUMBUS Surety.	\$5,000.00
/s/ M. W. CLARK Surety.	\$2,500.00
/s/ LORAN E. CAMON Surety.	\$2,500.00
/s/ LENA DENISON Surety.	\$5,000.00
/s/ JOHN T. CAMPBELL Surety.	\$5,000.00
/s/ FRED J. SNYDER Surety.	\$5,000.00
/s/ H. M. BAKER Surety.	\$5,000.00
/s/ M. B. KIRKPATRICK Surety.	\$5,000.00
/s/ JOHN H. CLAWSON Surety.	\$5,000.00

Name	Amount
/s/ FRANK M. REED Surety.	\$5,000.00
/s/ J. C. MORRIS Surety.	\$5,000.00
/s/ ROBERT N. KESSLER Surety.	\$2,500.00
/s/ E. D. HILLSTRAND Surety.	\$2,500.00

Justification of Sureties

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 305 Eagle; and that my net worth is the sum of more than Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ E. T. OLING,
Surety.

Sworn to and subscribed before me this 7th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ WINSLOW H. FRITZLAN,
Notary Public for Alaska.

My commission expires Feb. 10, 1958.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 325 Seventh Ave.; and that my net worth is the sum of more than Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ JOE PACKARD,
Surety.

Sworn to and subscribed before me this 7th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ WINSLOW H. FRITZLAN,
Notary Public for Alaska.

My commission expires Feb. 10, 1958.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 4th East H St., and that my net worth is the sum of more than Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ RUSSELL SWANK,
Surety.

Sworn to and subscribed before me this 7th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ WINSLOW H. FRITZLAN,
Notary Public for Alaska.

My commission expires Feb. 10, 1958.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 601 I Street; and that my net worth is the sum of more than Twenty-five Hundred Dollars (\$2,500.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ LEWIS E. SIMPSIN,
Surety.

Sworn to and subscribed before me this 7th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ WINSLOW H. FRITZLAN,
Notary Public for Alaska.

My commission expires Feb. 10, 1958.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 537 M St.; and that my net worth is the sum of Twenty-five Hundred Dollars (\$2,500.00) ex-

clusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ LOUIS ODSATHER,
Surety.

Sworn to and subscribed before me this 7th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ WINSLOW H. FRITZLAN,
Notary Public for Alaska.

My commission expires Feb. 10, 1958.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at Mountain View, Alaska; and that my net worth is the sum of more than Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ NORMAN G. LANGE,
Surety.

Sworn to and subscribed before me this 7th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ CARL J. HUTTON,
Notary Public for Alaska.

My commission expires:

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at Box 539, Anchorage; and that my net worth is the sum of more than Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ J. A. COLUMBUS,
Surety.

Sworn to and subscribed before me this 7th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ C. A. POLLOCK,
Notary Public for Alaska.

My commission expires April 25, 1954.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at Box 1679, Anchorage; and that my net worth is the sum of more than Twenty-five Hundred Dollars (\$2,500.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ M. W. CLARK,

Surety.

Sworn to and subscribed before me this 7th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ WINSLOW H. FRITZLAN,
Notary Public for Alaska.

My commission expires Feb. 10, 1958.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 1209 Mt. McKinley Apt.; and that my net worth is the sum of more than Twenty-five Hundred (\$2,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ LORAN E. CARMON,

Surety.

Sworn to and subscribed before me this 7th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ WINSLOW H. FRITZLAN,
Notary Public for Alaska.

My commission expires Feb. 10, 1958.

is the sum of more than Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ H. M. BAKER,
Surety.

Sworn to and subscribed before me this 8th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ WINSLOW H. FRITZLAN,
Notary Public for Alaska.

My commission expires Feb. 10, 1958.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at Anchorage, Alaska; and that my net worth is the sum of more than Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ FRANK M. REED,
Surety.

Sworn to and subscribed before me this 8th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ IRENE WELCH,
Notary Public for Alaska.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at Turnagain Arms Apts., Anchorage, Alaska; and that my net worth is the sum of Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ M. B. KIRKPATRICK,
Surety.

Sworn to and subscribed before me this 8th day of April, 1954, at Anchorage, Alaska.

[Seal]: /s/ MARY P. BARGERON,
Notary Public for Alaska.

My commission expires Sept. 14, 1957.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 1007 H St., Anchorage, Alaska; and that my

net worth is the sum of Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ JOHN H. CLAWSON,
Surety.

Sworn to and subscribed before me this 8th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ MARY P. BARGERON,
Notary Public for Alaska.

My commission expires Sept. 14, 1957.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 602-4th, Anchorage, Alaska; and that my net worth is the sum of more than Five Thousand Dollars (\$5,000.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ J. C. MORRIS,
Surety.

Sworn to and subscribed before me this 8th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ WANDA J. WILLFORD,
Notary Public for Alaska.

My commission expires Oct. 5, 1957.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 2020 Hillstrand Blvd.; and that my net worth is the sum of more than Twenty-five Hundred Dollars (\$2,500.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ ROBERT N. KESSLER,
Surety.

Sworn to and subscribed before me this 8th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ NORA FAY CARLOCK,
Notary Public for Alaska.

My commission expires Oct. 27, 1956.

United States of America,
Territory of Alaska—ss.

I, the undersigned surety, on oath say that I reside at 2010 Hillstrand Blvd.; and that my net

worth is the sum of more than Twenty-five Hundred Dollars (\$2,500.00) exclusive of property exempt from execution and under and over all just debts and liabilities.

I further say that I am not an attorney, marshal, clerk of any court or other officer of any court.

/s/ EARL D. HILLSTRAND,
Surety.

Sworn to and subscribed before me this 8th day of April, 1954, at Anchorage, Alaska.

[Seal] /s/ NORA FAY CARLOCK,
Notary Public for Alaska.

My commission expires Oct. 27, 1956.

[Endorsed]: Filed April 9, 1954.

[Title of District Court and Cause.]

No. A-8214

COST BOND

Know All Men By These Presents: That we, Matanuska Valley Lines, Inc., as Principal, and the General Casualty Company of America, a corporation organized under the laws of the State of Washington and authorized to do business in the Territory of Alaska, as Surety, are held and firmly bound unto Dorothy Neal and Nathaniel Neal, Jr., the plaintiffs above named, in the full sum of Two

Hundred Fifty Dollars (\$250.00), for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The Condition Of The Above Obligation Is Such That, Whereas the defendant has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed February 26, 1954, from the judgment of this court entered October 1, 1953, if the defendant shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void; but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated this 3rd day of March, 1954.

MATANUSKA VALLEY
LINES, INC.,
Principal;

By /s/ EVANDER C. SMITH,
Attorney in Fact.

[Seal] GENERAL CASUALTY
COMPANY OF AMERICA,

By /s/ GRACE M. McCONNELL,
Attorney-in-Fact.

[Endorsed]: Filed March 5, 1954.

[Title of District Court and Cause.]

No. A-8214

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, Wm. A. Hilton, Clerk of the above-entitled Court do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, and including specifically the designated portion of the record and file of such action, including the bill of exceptions setting forth all the testimony taken at the trial of the cause and designated exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled cause by the above-entitled Court on October 14, 1953, to the United States Court of Appeals at San Francisco, California.

[Seal] WM. A. HILTON,
Clerk of the District Court for the Territory of
Alaska, Third Division.

By /s/ CARETA BRYANT,
Chief Deputy Clerk.

[Endorsed]: No. 14529. United States Court of Appeals for the Ninth Circuit. Matanuska Valley Lines, Inc., a corporation, Appellant vs. Dorothy Neal and Nathaniel Neal, Jr., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Alaska Third Division.

Reporter's transcript in Case No. 14529.

Filed September 27, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit at San Francisco

No. 14529

MATANUSKA VALLEY LINES, INC.,

Appellant,

vs.

DOROTHY NEAL and NATHANIEL NEAL,
JR.,

Appellees.

STATEMENT OF POINTS

The defendant appellant, Matanuska Valley Lines, Inc., herewith presents to the Circuit Court for the Ninth Circuit the following particulars and points upon which it is claimed the trial Court erred:

1. In failing to dismiss the Complaint upon Motion of the defendant Matanuska Valley Lines, Inc., made upon the completion of the plaintiff's case in chief for the reason that the plaintiff presented insufficient evidence of negligence on the part of the said defendant to constitute a *prima facie* case.

2. In failing to direct a verdict upon the Motion of the defendant Matanuska Valley Lines, Inc., made upon the completion of the defendant's case in chief for the reason that the plaintiff had not presented sufficient evidence of negligence on the part of the said defendant Matanuska Valley Lines, Inc., to take the case to the jury.

3. That the verdict of the jury and the judgment entered thereon against the defendant Matanuska Valley Lines, Inc., are contrary to the evidence produced in the case.

4. In permitting the defendant Matanuska Valley Lines, Inc., to exercise only one set of peremptory challenges although there were three (3) cases being tried by the Court to expedite the matters.

5. That the Court's Instructions to the Jury, as to the following numbered instructions in the designated parts were erroneous:

Instruction No. Fourteen (14). We take exception to Instruction No. Fourteen (14) on the grounds that there is no evidence to support the idea that the bus might have been exceeding the speed limit; that there is no credible evidence that the speed limit was fifteen (15) miles an hour; that the highway regulations actually state that fifteen (15) miles an hour shall be deemed reasonable and prudent but do not state that it will be unreasonable and imprudent to fail to stay within this limit. We take exception to that portion of the instruction which states that otherwise the speed limit will be twenty-five (25) miles an hour. We refer to the Highway Instruction Regulation, Section 53C, and submit that it should be fifty (50) miles an hour.

Instruction No. Fifteen (15). Instruction No. Fifteen (15), lines 13 through 17, reads as follows: "Likewise, if you find that the driver of the bus of

the defendant Matanuska Valley Lines, Inc., was exceeding the speed limit at the time of the collision and that this fact was the sole proximate cause of the collision, you should find against that defendant alone," we take exception to this on the grounds that there was no credible evidence to support the inclusion of that portion of the instructions.

Instruction No. Seventeen (17). We take exception to Instruction No. Seventeen (17), lines 11 through 14, which reads as follows: "Of course, if you find that only one of the defendants was negligent and that such negligence was the proximate cause of the collision and the resultant injuries and damages, then you should find only against that defendant," on the grounds there was no possibility of a single verdict against the Matanuska Valley Lines, Inc., and not against the co-defendants Williamses.

Instruction No. Eighteen (18). We take exception to Instruction No. Eighteen (18), which reads as follows: "You are instructed that, in arriving at the verdict as to the amount of damages for permanent injuries, if any, resulting in a permanent loss of earnings by the plaintiff, if any, you may consider the mortality tables referred to in evidence as tending to prove the life expectancy of the plaintiff: Dorothy Neal. Such tables are not binding, however, and you may determine such life expectancy from your own observation of the plaintiff, and such other assistance as you may obtain from the evidence, and all the facts and circumstances in

evidence, including such tables. You have a right to consider the probability of accident, sickness, or other happenings reasonably likely to terminate the results of plaintiff's injuries.

"In making an award for permanent loss of earning power, if any, the present worth of such award must be determined. The present worth of a sum of money payable in the future is such a sum as would, if put at simple interest, at the rate of return that a reasonable and prudent person would expect in making investments, amount to what the plaintiff Dorothy Neal could reasonably expect to earn during her life. To illustrate: The present worth of \$10,000 payable 20 years from today is determined by the following formula:

$$\frac{\$10,000}{1 \text{ plus } 20 \text{ times } .04} = \frac{\$10,000}{1.8} = \$5,555.55$$

"Assuming that 4% interest would be the rate of return that a reasonable and prudent man would expect to obtain in making investments, it is for you to decide what that rate of return, or interest, would be, considering all the circumstances. Similarly the present worth of \$1,000 to be paid over a period of 10 years, with an assumed safe investment rate of 5% is calculated by dividing \$1,000 by the sum of one plus the number of years of life expectancy times the investment rate or

$$\frac{\$1000}{1 \text{ plus } (10 \text{ times } .05)} = \frac{1000}{1 \text{ plus } .05} = \frac{1000}{1.5} = \$666.$$

“After you have determined what the plaintiff Dorothy Neal would earn during her life, you should determine the present value thereof according to the foregoing formula, and award her that sum, if you find her entitled to recover for loss of earning power,” on the grounds that there was no evidence introduced to support that formula; that there was no evidence introduced on what a reasonable return from investment amounts to; on the grounds that the use is simple interest instead of compound interest; and on the grounds that it is too technical for the jury to follow accurately.

HELLENTHAL, HELLENTHAL, COTTIS and
EVANDER C. SMITH,

MARTIN & SHORTS,
Attorneys for Appellant Matanuska Valley Lines,
Inc.

By /s/ EVANDER C. SMITH.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 21, 1954.

Nos. 14,529, 14,530 and 14,531

IN THE

United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY LINES, INC.,

a corporation,

Appellant,

VS.

DOROTHY NEAL and NATHANIEL NEAL, JR.,

Appellees.

MATANUSKA VALLEY LINES, INC.,

a corporation,

Appellant,

VS.

BLANCHE THOMAS,

Appellee.

MATANUSKA VALLEY LINES, INC.,

a corporation,

Appellant,

VS.

WORDIE FRAZIER and PRINCE FRAZIER,

Appellees.

On Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

WENDELL P. KAY,

604 Fourth Avenue, Anchorage, Alaska,

STRINGER & CONNOLLY,

Room 210, Central Building, Anchorage, Alaska,

Attorneys for Appellees.

FILED

JUL 11 1955

PAUL P. O'BRIEN, CLERK

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Nos. 14,529, 14,530 and 14,531

IN THE

United States Court of Appeals
For the Ninth Circuit

MATANUSKA VALLEY LINES, INC.,
a corporation,

Appellant,

VS.

DOROTHY NEAL and NATHANIEL NEAL, JR.,
Appellees.

MATANUSKA VALLEY LINES, INC.,
a corporation,

Appellant,

VS.

BLANCHE THOMAS,

Appellee.

MATANUSKA VALLEY LINES, INC.,
a corporation,

Appellant,

VS.

WORDIE FRAZIER and PRINCE FRAZIER,
Appellees.

On Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

JURISDICTION.

The appellees accept generally the jurisdictional statement of the appellant, with particular reference

to the provisions of 28 U.S.C., Section 1291. The statement should be supplemented by reference to 28 U.S.C., Section 1294.

STATEMENT OF THE CASE.

(a) The Pleadings.

Appellees concur in the statement of the pleadings contained in appellant's brief under the heading "Pleadings and Facts" (Br. 1-2). But appellees point out that, the cases having been consolidated (R. 51), only one judgment was entered in the consolidated case (No. 14,529, R. 15).

(b) The Evidence.

Appellees Dorothy Neal, Wordie Frazier and Blanche Thomas were injured in an accident which occurred between 9:00 and 10:00 on November 20, 1951, when the appellant's bus in which they were fare paying passengers collided with a flat bed truck driven by Lois Williams on a curve in East "G" (Gambell Street) near Anchorage, Alaska (R. 92, 121, 111, 418).

Lois Olson, the employee of appellant driving the bus, was thoroughly familiar with the route and the road conditions: "I travel over the road enough to almost memorize the bumps" (R. 343).

The point where the accident occurred is on the level valley between two hills, at which point Gambell Street has descended from 15th Avenue, makes a sweeping "S" curve, and ascends to Fireweed Lane

(Pl. Ex. 1). The accident occurred at the bottom of the "S" (proceeding from 15th toward Fireweed). The bus was going North into town, and the truck was proceeding in the opposite direction toward the intersection of Fireweed Lane. From the top of one hill the entire valley, including the road and traffic on it, can be observed from the other. There was testimony that visibility, at the time of the accident, was good and was only temporarily and partially obscured by foliage around the curve itself (R. 364, 418).

Lois Williams, the driver of the truck, apparently pulled out of 17th Avenue onto Gambell Street and headed South on Gambell at about the time the bus commenced to descend the hill (R. 403, 415). The two vehicles met on the curve. The truck was coming toward the bus at a speed variously characterized as "a little too fast" (R. 111); "at a tremendous rate of speed" (R. 123) "at this tremendous speed" (R. 152); "coming fast" (R. 158); "at a pretty good rate of speed" (R. 344). Gambell Street, at the time was a gravel road full of "chuck holes" (R. 79), "a little bumpy and full of chuck holes and very slippery and rather icy" (R. 93), "icy and slippery" (R. 117), "terribly slippery" (R. 151), "bumpy" (R. 153), "in a rough condition" (R. 343), "rough" (R. 360), covered with a "light snow" (R. 435). There was a rough area with protruding rocks on the inside of the curve, that is the side of the road upon which the truck was proceeding (R. 461, 463, 465).

Lois Olson, the driver of the Matanuska bus, gave several versions of the collision. She placed the ap-

proaching truck, when first observed by her, at distances varying all the way from 50 to 70 feet (2 or 3 bus lengths) (R. 484), clear up to a city block and a half (500 feet) away (R. 423-424). At one point she stated that the truck was the *same* distance from the point of impact that she was when she first noticed it (R. 362), and then placed the truck *nearer* to the point of collision than was the bus (R. 376).

Appellant's driver knew that there were bumpy rocks and a rough condition in the path of the oncoming truck (R. 362). On direct examination she stated that at the speed the truck was coming, even if the truck driver had been completely sober, she could not have controlled the vehicle.

“Q. Will you state, if you know, just why it was that the truck did collide with the bus?

A. Well, on that curve the cars had been coming around it and before it had frozen, it had beat a sort of a ditch along there and left the hard rocks sticking up frozen into the ground and when her front wheels hit the hard rocks sticking up, it caused the wheels to bounce and therefore she lost control of the truck.

Q. It wasn't actually a skid?

A. No, it wasn't a skid. Her wheels were bouncing so it wasn't touching the ground enough for her to control the truck.

Q. If we assume that she was completely sober at the time, do you think she could have controlled the truck?

A. Not at that speed, she couldn't have. No.

Q. And the fact that you were so familiar with that section of the road was the reason that you were being fairly slow at that point?

A. That's right." (R. 345).

Lois Williams, the driver of the truck, agreed with Olson that the two vehicles were equidistant from the point of collision when she first observed the bus (R. 414-415). She was on her own side of the road until she hit the rocks on the inside of the curve and lost control of her vehicle (R. 409, 411).

After observing the approaching truck, Olson continued to proceed toward town and neither pulled off to the right, slowed her vehicle, sounded her horn, nor took any other action (R. 113, 124-6, 148, 158, 372, 415, 421).

The collision occurred and this suit followed.

(c) Verdict, Judgment and Appeal.

Verdicts in favor of the five appellees were returned on September 24, 1953, totalling \$101,500.00 (No. 14,529, R. 16) (No. 14,531, R. 14) (No. 14,530, R. 12). Judgment was entered in the consolidated case accordingly, on October 14, 1953, with interest at six percent per annum (No. 14,529, R. 16-19). After motions, and supplementary motions for new trial, or in the alternative to set aside the judgment, or to reduce the amounts of the verdicts had been denied (R. 51-57), appellant filed its notice of appeal in the consolidated case (R. 57).

SUMMARY OF ARGUMENT.

1. Although the evidence was conflicting, there was ample evidence to require submission of the case to the jury and to sustain the verdicts and judgment.

2. There was no error in the instructions, and the instructions as a whole, fully and fairly presented the issues to the jury.

(a) Instruction 14 was an accurate statement of the applicable speed limits.

(b) No confusion resulted from the giving of Instruction 18 relating to the present worth of future earnings.

3. The rulings of the court with regard to peremptory challenges were proper.

ARGUMENT.

1. **ALTHOUGH THE EVIDENCE WAS CONFLICTING, THERE WAS AMPLE EVIDENCE TO REQUIRE SUBMISSION OF THE CASE TO THE JURY AND TO SUSTAIN THE VERDICTS AND JUDGMENT.**

Appellant baldly states that there was no evidence of negligence on the part of Matanuska or its driver, and that the "facts are uncontroverted" (Br. p. 8).

Nothing could be farther from the truth. In fact, there were contradictions and disputed issues in the evidence on almost every fact issue in the case, and there was ample evidence of negligence on the part of Matanuska to justify the verdict of the jury and the judgment of the Court.

Take, for example, the testimony of the driver of the bus, Lois Olson:

(1) Her first version of the collision was given to an investigator on December 11, 1951, about three weeks after the date of the accident:

“I was almost at the base of the hill when I saw the truck coming toward me at a pretty good clip and was about to enter the curve. *The truck was two or three bus lengths away when I first saw it.* It was bouncing up and down on some rocks that were embedded in the roadway on the left hand side of the road from me. I pulled over to the right hand side of the road as fast as I could and as far over as I could. I stepped on the gas to try and get out of the way as the truck entered the curve and bounced over to the center of the road toward the bus.” (Emphasis supplied) (R. 484).

This should be considered in connection with her admission in the same statement that “visibility was good” (R. 483), and other testimony that there was “nothing to obscure the vision”, that one could see the road from one hill to the next (R. 364), and that the entire road is “practically 100 percent clear vision” (R. 452), more than 300 feet at any place (R. 452).

A “bus length” being 26 feet (R. 436), it is apparent that, on this version of the facts, the bus driver was negligent in not observing the speeding truck bouncing toward her on the rocky road until it was less than 70 feet away, when she could have seen its approach at 300 or more feet. A passenger

on the bus observed the truck at more than 100 feet (R. 111), and the truck driver saw the bus at about 150 feet (R. 418). Had the bus driver been maintaining a proper lookout for the approaching danger, appropriate steps could have been taken, such as pulling over on the shoulder, sounding her horn, or stopping her vehicle.

(2) At the trial, however, the Matanuska driver gave a different version (or versions) of the collision. According to her testimony as finally corrected, she first observed the approaching truck about *500 feet away* (one and one-half city blocks) (R. 423-4). Although it was speeding, it was holding to its side of the road and she had no reason to believe it would leave the curve (R. 344). She had just pulled around a pot hole in the right hand lane and was on the right hand edge of the road (R. 363). She was still in second gear, traveling only about 10 miles per hour, and three or four feet from the center line of the highway (R. 368-9). The truck suddenly bounced on the rocks, lurched across the road and struck the side of the bus (R. 347-8).

(3) Both of these stories of how the collision took place are controverted by other facts and testimony in evidence.

(a) The bus had not slowed down (R. 158), but had "picked up quite a bit of speed" (R. 177, 188). The bus was traveling 20 to 25, or 30 to 35, miles per hour (R. 95, 151). The driver once stated she was going from 15 to 20 miles per hour (R. 345), then at 10 miles per hour (R. 368), and then on cross ex-

amination so placed the two vehicles that she admitted *they must have been proceeding at the same speed* (R. 361-362). The truck was speeding by all witnesses (R. 111, 123, 152, 158, 344), although the truck driver only estimated her speed at 25 to 30 miles per hour (R. 403). These speeds might well be substantiated by the generally agreed fact that both the bus and the truck proceeded, out of control, about 100 feet, respectively, before coming to rest after the crash (R. 105, 112, 435, 436). The bus was a total loss, except for salvage parts, following the collision (R. 431).

(b) The point of impact occurred at or near the center line of the highway. Williams, the truck driver, put it "right on the line" (R. 421). Officer Boyd, by examining the debris in the road, placed the point of contact a little to the East (R. 94), but not more than one or two feet East of the center line (R. 459). On the other hand, Russell Swank, owner of the bus company, placed the point of collision at about six feet to the East of the center of the road (R. 332). The bus driver stated, as noted above, that she was "well over" or "way over" on the right hand side of the road in the loose gravel (R. 347, 363). The road at this point was "plenty wide, with three lanes of traffic" (R. 427), being 28 feet wide or wider from shoulder to shoulder (R. 76, 78, 106). The bus was eight feet wide (R. 436), and the truck was no more (R. 416).

(c) Both Charles E. Johnson, an uninjured passenger on the bus, and the driver of the truck, tes-

tified that the bus could have been pulled farther over to the right in order to avoid the collision (R. 134, 135, 136, 94, 415). Johnson said: "I would have pulled over as far as I could have to the side of the road which would probably be out in the gutter, but I know it would have been safe and as far as that vehicle was approaching." (R. 148). Lois Williams testified that there was about six feet on the other side of the bus before it would have reached the shoulder (R. 415). Again, Olson testified that she had just gone around a large pot hole in the road and was as far over on the right hand side of the road as she could get (R. 347, 363, 368). Officer Boyd testified that there was no large pot hole on the East (bus') side of the highway (R. 461). Passengers on the bus and the driver of the truck denied that the bus had swerved to the right or gone around a pot hole just prior to the collision (R. 113, 158, 415). As Lois Williams put it:

"Q. The bus, as a matter of fact, came right down on its own side of the road, close to the center line right up to the point of impact, did it not?

A. Yes, sir." (R. 415).

(d) In contrast to the testimony stated above that the visibility on the curve was good and that there was "nothing to obscure the vision" (R. 111), it should be noted that Lois Olson, the bus driver, testified that

"When you are coming down the hill and almost at the curve, the car coming along the level part

is obstructed by the brush that was there. It isn't there now * * *

Q. There your vision was limited to some degree by the brush at the side of the road. Is that correct?

A. Some degree, yes." (R. 364-365).

And the truck driver testified:

"Q. (by Mr. Kay). Mrs. Williams, did you hear the testimony of the bus driver, Mrs. Olson, that there was some brush on the curve which partially obstructed the view around the curve at that point?

A. Yes, I did.

Q. You also noticed that brush obscuring the view there, didn't you?

A. Yes, it was there, all right." (R. 418).

(e) Many witnesses testified that the road, on the day of the collision, was in an extremely icy and slippery condition. Officer Boyd characterized the roadway as "very slippery and rather icy" (R. 93). Johnson testified that the road was "icy and slippery" (R. 117). On the other hand, Russell Swank, owner of the bus line, testified that while the road was very rough, "It wasn't slippery. In computing the time of year and actually equivalent to other roads, it was in a normal condition. The weather was cold and it is not normally slippery when the temperatures are five or ten degrees below freezing." (R. 431).

(f) There was considerable conflict in the evidence as to the condition of the bus prior to the time of the collision. This vehicle was a 1938 model twin

coach, purchased second-hand from the Tacoma Transit Company, where the bus had been in storage for two years, about a year prior to the time of the accident (R. 430). Russell Swank testified that the bus had been completely renovated prior to the accident and indicated that the bus was in good operating condition. Lois Olson testified that the bus was in "very good condition" for proper operation (R. 346). On the other hand, Johnson testified that the busses were "very inadequate" and "nothing but crates" (R. 128). He further characterized the condition of the bus as "terrible" (R. 137), and stated that "hardly anything on that bus worked, speedometer or anything else worked" (R. 151). Admittedly, the speedometer was not working (R. 345). Officer Boyd estimated the damage to the bus at \$225.00 and stated that, in his opinion, "the bus was not worth much more than that to start with." (R. 475-6). The bus was not equipped with chains (R. 437).

Certainly it is apparent that, from this mass of conflicting testimony, the jury could have found facts establishing appellant's negligence. For example, and for example only, the jury might have concluded: that appellee passengers were being transported for hire by appellant in an antiquated bus in terrible condition; that the bus was being driven without chains at a speed in excess of the lawful limit and greater than was commensurate with safety, over an icy and slippery road; that the bus was met on a curve by a truck being driven at a high rate of speed; that, although the driver of the bus could have ob-

served the truck's approach for a great distance, she did not see it until the truck was within 50 to 70 feet; that the driver of the bus knew there was a rocky and bumpy road condition in the immediate path of the truck; that the bus driver *knew* that the driver of the truck might well lose control upon striking the rocks; that there was ample room on the right for the bus driver to pull over; that if the bus driver had pulled over to the edge of the road, there would have been no collision; that the bus driver neither swerved to the right nor applied her brakes—that, in fact, she did nothing.

Under such circumstances should this court disturb the verdict of the jury, or the judgment of the lower court? We think not.

“A verdict for plaintiff should not be set aside if it can be sustained from any viewpoint of approach.” *Liquid Veneer Corporation v. Smuckler* (CCA 9th, 1937) 90 Fed. 2d 196, 205.

These appellees and the trial court are entitled to have the evidence, and the conflicts in it, considered in its most favorable light, and should receive the benefit of every legitimate and reasonable inference to be drawn from the evidence introduced. The question is not whether the evidence brings conviction to the minds of this court, but whether reasonable men could reach different conclusions upon it. *United States v. Meserve* (CCA 9th, 1930) 44 Fed. 2d 549; *United States v. Meakins* (CCA 9th, 1938) 96 Fed. 2d 751, 756; *United States v. Bemis* (CCA 9th, 1939) 107

Fed. 2d 894, 297; *Commercial Casualty Ins. Co. v. Stinson* (CCA 6th, 1940) 111 Fed. 2d 63.

Appellant's first argument addressed to the weight of the evidence places reliance upon the fact that the bus was at all times on the proper side of the road, and that the truck had crossed the center line to reach the point of impact (Br. 8-12). Conceding that, under normal conditions, a motorist has a right to assume that a vehicle approaching it in the opposite direction will obey the law of the road and will not suddenly cross the center line, such is not the invariable rule. And it is certainly not the rule where unusual circumstances such as the speed of the approaching vehicle, its erratic behaviour, the location, or conditions of the road, make such an assumption unwise. Much less is the driver entitled to blind reliance upon the law of the road when operating under the high duty of care imposed upon carriers of passengers for hire. *Cole v. Capital Transit Co.* (CA DC, 1952) 195 Fed. 2d 568.

In *Texas Bus Lines v. Whatley* (Tex. 1948) 210 SW 2d 626, the plaintiff bus passenger was injured in a head-on collision with another vehicle which had crossed the center line into the path of the bus. The bus driver made a gradual application of his brakes, but the collision occurred. The court pointed out:

“Rules as to right-of-way are invaluable as means of avoiding collisions, and had Ellison obeyed them the collision in question would not have happened. But the bus driver here was confronted with an imminent collision. He owed the

duty to his passengers to do what a very prudent and cautious person would do under the same or similar circumstances.” (630).

So, in the present case, the driver of the Matanuska bus, “law of the road” or not, had no right to imperil her passengers by proceeding blithely down the road near the center line, without pulling over or slowing down, when she saw the speeding truck approaching the rocky and dangerous point in the road. She had no right to speculate that the driver of the truck would probably be able to control it. See, *Nichols v. City of Phoenix* (Ariz. 1949) 202 Pac. 2d 201, where the court pointed out that the driver of a carrier is not relieved of the high duty of care owing his passengers merely because he carefully and conscientiously observes the law of the road in proceeding through an intersection, when he observed, or could have observed, another vehicle approaching from the side at high speed. Under such circumstances he cannot rely upon the duty of the other motorist to stop, and there is an issue of fact for the jury as to the negligence of the bus driver. Quoting from an Illinois case, the court said:

“The driver in charge of defendant’s bus could not negligently calculate on his ability to avoid danger to its passengers, nor so calculate and speculate as to the safety of the passengers in any respect.” (207).

To the same effect is *Longo v. Yellow Cab Co.* (DC ED Pa. 1948) 79 Fed. Supp. 478; *Cole v. Capital Transit Co.*, *supra*.

Nor can appellant successfully contend that the "emergency" presented by the oncoming truck was so sudden as to preclude any corrective action on the part of the bus driver (Br. 12-14).

The high degree of care imposed upon a common carrier of passengers must be exercised in *foreseeing*, as well as in guarding against dangerous situations such as arise when another vehicle skids in front of the carrier. *Rozmajzl v. The Northland Greyhound Lines* (Ia. 1951) 49 NW 2d 501; see, *Horsley v. Robinson* (SC Utah, 1947) 186 Pac. 2d 592.

Or, as the court said in the *Cole* case, *supra*:

"The crucial question is not what the motorman did after he was faced with the emergency, of the Barnes car, but how he happened to become involved in that emergency. Were the circumstances such that he by proper care and foresight should have apprehended danger of a collision? If so, * * * it became the motorman's duty to do all that reasonably could have been done to avoid the impending danger." 195 Fed. 2d 568, 569.

To the same effect, see *Williams v. Capital Transit Co.* (CA DC 1954) 215 Fed. 2d 487; *Gillogly v. New England Trans. Co.* (R.I. 1948) 57 Atl. 2d 411.

So, here, the bus driver saw or could have seen, the truck approaching at a dangerous speed for more than 300 feet (R. 452, 364). She knew the rocky and rough condition in the path of the speeding truck (R. 362) and knew the driver might well lose control at that speed (R. 345).

The “emergency” which then arose was of appellant’s own making.

Collision cases, such as the present one, between a public carrier and another vehicle coming into the lane of traffic occupied by the carrier, are unfortunately far from rare. Many of them present features such as dangerous road conditions, speed, and proper lookout quite similar to the case now before this court. In almost every such case the conflicting evidence requires, or makes proper, submission of the case to the jury for its decision, and indicates affirmance on appeal. See, for example, *Hennessey v. Burlington Transp. Co.* (DC Mont., 1950) 103 Fed. Supp. 660 (bus-truck head-on collision on icy road; speed, proper lookout); *Roy v. Mission Taxi Co., Inc.* (Cal. 1951) 225 Pac. 2d 920 (taxi-truck; speed, center of road, lookout); *Price v. Greenway* (CA 3rd, 1948) 167 Fed. 2d 196 (bus-parked truck; speed, lookout); *Atlantic Greyhound Corporation v. Lauritzen* (CA 6th, 1950) 182 Fed. 2d 540 (bus-passenger car; speed, distance, lookout); *Curlee v. Morris* (Ariz. 1951) 231 Pac. 2d 752 (taxi-passenger car head-on collision; speed, center of road, emergency action); *Gillogly v. New England Transp. Co. supra* (bus-passenger car head-on collision; speed, control).

It should be noted that the courts in such cases are not concerned with the *degree* of negligence exhibited by the carrier. The evidence may demonstrate gross negligence on the part of the other vehicle, and only “thin” or slight negligence on the part of the carrier. But, as pointed out in *Red Top Cab and*

Baggage Co. v. Masilotti (CA 5th, 1951) 190 Fed. 2d 668:

“The appellants could not escape liability by proof that the negligence of the taxi cab driver, if any, was of small degree when compared to that of the driver of the other automobile involved in the collision. Plaintiff’s actions proceeded against both drivers as joint tort feasons whose negligence combined and concurred to cause the collision. Consequently if the collision resulted from the concurring negligence, either party is liable to the plaintiff to the same extent as though the injuries had been caused by his negligence alone.” (At 670-671).

See, also, *Curlee v. Morris, supra*.

The following surprising statement appears at page 15 of Appellant’s brief: “The *res ipsa loquitur* doctrine does not apply to collision cases.”

The statement is “surprising” because of its inaccuracy. In fact, where plaintiff is a fare-paying passenger on a carrier involved in a collision (as in the present case) the doctrine of *res ipsa loquitur* is available, at least to create a prima facie case or presumption of negligence on the part of the carrier. Although the courts differ as to scope of the doctrine in such cases, such is the rule in apparently a majority of the jurisdictions which have faced the question. Annotations on the specific subject are found in 25 ALR 690; 83 ALR 1163; 161 ALR 1113.

Obviously the application of the rule is proper. Why should the passenger be required to keep a look-

out for danger and be able to explain the cause of an accident? *Loudoun v. Eighth Ave. R. Co.* (NY 1900) 56 N.E. 988. In the present case, two of appellees, Mrs. Frazier and Mrs. Neal, knew nothing about what happened; they were chatting, as they had every right to do, when the collision occurred (R. 177, 197).

For good cases on the application of the doctrine under like circumstances from other courts and jurisdictions, see: *Kansas City F. S. & M. R. Co. v. Stoner* (CCA 8th, 1892) 49 Fed. 209; *Capitol Transit Co. v. Jackson* (CCA DC 1945) 149 Fed. 2d 839; *Williams v. Capital Transit Co. supra*; *Laphew v. Consolidated Bus Lines, Inc.* (W. Va., 1949) 55 S.E. 2d 881; *Plumb v. Richmond Light & R. Co.* (N. Y. 1922) 135 N.E. 504; *Christensen v. Surface Transp. Corp. of New York* (N. Y. 1954) 128 N.Y.S. 2d 146; *Stark v. Yellow Cab Co.* (Cal. 1949) 202 Pac. 2d 802; *Deshotel v. Atchison T. & S. F. Ry. Co.* (Cal., 1954) 272 Pac. 2d 71; *Whitney v. Northwest Greyhound Lines, Inc.* (Mont. 1952) 242 Pac. 2d 257, 262; *Rothweiler v. St. Louis Public Service Co.* (Mo. 1950) 234 S.W. 2d 552.

In any event, we submit that there was more than sufficient evidence of negligence on the part of appellant, without reliance on the doctrine of *res ipsa loquitur*, to go to the jury, and we so treated the subject in our argument to the court (R. 304-313).

2. **THERE WAS NO ERROR IN THE INSTRUCTIONS, AND THE INSTRUCTIONS AS A WHOLE, FULLY AND FAIRLY PRESENTED THE ISSUES TO THE JURY.**

(a) **Instruction 14 Was an Accurate Statement of the Applicable Speed Limits.**

The portion of Instruction No. 14 quoted in appellant's brief (Br. 16) is only a part of the instruction, containing a part of the applicable law. We have set forth the entire instruction and the entire law and speed regulation (having the effect of law) in the appendix to this brief. We believe the instruction, although concise, gave the jury all the information with regard to the speed limit at the point of the accident which was required by the evidence.

Summarized, the law concerning the speed limit was as follows: (1) generally, no greater than "reasonable or prudent" under conditions existing at the time and place; (2) if the view on the curve was obscured within 100 feet, fifteen miles per hour; (3) if posted for a speed limit, the posted speed; (4) if unobscured and unposted, then 50 miles per hour, shall be deemed "reasonable or prudent" in each instance.

There was evidence that the view on the curve was both obscured and unobscured. Olson and Williams both testified that foliage obscured the vision to some extent at that time (R. 364, 418). Johnson and Swank, on the other hand, indicated that there was nothing to obscure the visibility (R. 111, 450-3). There was also some testimony that the posted limit at the time was 35 miles per hour (R. 448). As we have noted above, witnesses placed the speed of the

bus at everywhere from 10 m.p.h. to as fast as the truck; *supra*.

It was for the jury to resolve these apparent conflicts, and all that this instruction did was supply them with the law applicable to whatever set of facts they might find. The instruction was purely definitive, and any portions of it which did not fit the facts found by the jury would be disregarded by them and may be considered harmless surplusage.

Counsel for appellees did not "blow hot and cold simultaneously" on this question (Br. 17). Counsel argued that the view was unobstructed at a time when there was *no evidence to the contrary* (R. 305); when contradictory evidence was introduced he altered his argument accordingly.

(b) No Confusion Resulted From the Giving of Instruction 18 Relating to the Present Worth of Future Earnings.

Again, in discussing Instruction No. 18, appellant's counsel has brought only a portion of the instruction before the court (Br. 18). The entire instruction will be found in the Appendix of this brief and in the record at page 519.

This instruction was intended to give the jury a method of computing damage for permanent loss of earnings, if any, on the part of appellee Dorothy Neal. Mrs. Neal had testified that she had been earning an average of \$50.00 per week (R. 195), and an insurance underwriter had testified that her life expectancy at age 24 was then 42 years (R. 269). The portion of the instruction which appellant argues is

so technical and confusing as to be objectionable relates to the simple formula which the court included in the instruction as a yardstick which the jury might use in determining the present worth of her future earnings. The court apparently took this formula from the opinion of this court in *Aetna Life Insurance Co. v. Geher* (CCA 9th, 1931) 50 Fed. 2d 657, at 660, where the formula, in computing the present worth of \$2,000.00 payable in 17, 18 and 19 years, was expressed as:

$\$2000 \div (17 \times 7\% + 1) = \913.24 present worth

$\$2000 \div (18 \times 7\% + 1) = \884.96 present worth

$\$2000 \div (19 \times 7\% + 1) = \858.37 present worth

All of the actual elements entering into the formula, such as life expectancy, amount of future earnings, and rate of return were carefully left to the determination of the jury by the complete instruction, and all other elements of damage were covered by another instruction (R. 518).

We certainly agree that the purpose of an instruction should be to inform and assist, not to confuse the jury. We submit that it would have been difficult for the trial court to have devised a more pointed and explicit instruction on this subject. We see nothing "confusing" or giving rise to "confusion" in this formula as contained in Instruction No. 18, nor as contained in the opinion in the *Aetna Life* case, *supra*.

In any event, there has been no showing that the jury was in any way confused or that they failed to follow the instruction of the court, and indeed appellant has made no attempt to make such a showing.

This court has held that the appellant is entitled to no relief in such circumstances. *Harper & Reynolds Co. v. Wilgus* (CCA 9th, 1893) 56 Fed. 587; *Husky Refining Co. v. Barnes* (CCA 9th, 1941) 119 Fed. 2d 715, 717.

The trial court gave a thorough and complete charge to the jury, fully covering all of the law involved in the proceeding. Appellant has argued fault in only two out of the 38 separate instructions. Considered as a whole, the instructions fairly and substantially presented the issues to be decided, and the judgment should not be disturbed on appeal. *Goodyear Fabric Corporation v. Hirss* (CCA 1st, 1948) 169 Fed. 2d 115; *Rowe v. Dixon* (Wash., 1948) 196 Pac. 2d 327.

3. THE RULINGS OF THE COURT WITH REGARD TO PEREMP- TORY CHALLENGES WERE PROPER.

Appellant contends that the trial court committed error in denying appellant more than three peremptory challenges, "although there were three cases being tried by the court" (Br. 20).

(a) Perhaps the most obvious and accurate answer to this contention is the fact that the court did *not* deny additional peremptory challenges to the appellant at any time. In fact, the court explicitly offered such additional challenges as they might require upon a showing of cause out of the presence of the jury. This offer was declined. The record at this point discloses the following:

“Mr. Cottis. If the Court please, before examining the alternate jurors, the defendants ask that they have another peremptory challenge.

The Court. Well, you will have to show good cause for it.

Mr. Cottis. The defendants believe that as a matter of right they are entitled to more peremptory challenges.

The Court. Well, what has been the practice in this court?

Mr. Cottis. As far as I recall, Your Honor, this is the first *consolidated case* I have ever been in (emphasis supplied).

The Court. I have never heard of the practice being other than what the court has declared in this case but you may be entitled to an additional peremptory challenge but only upon showing good cause for it. Now, of course, obviously that cause does not have to be announced in court but it has to be told to the court in private or that is, at least at the bench where the other attorneys are present.

Mr. Cottis. Well, we do not ask for a peremptory on the basis of any particular cause, Your Honor, but we demand an additional peremptory challenge as a matter of right” (R. 70-71).

From the entire colloquy, including the final invitation by the court and the final response of counsel, it is obvious that appellant was far less desirous of actually employing an additional challenge than it was of creating an additional point for consideration by this court. The trial court recognized this fact in his opinion (R. 55-6).

(b) While formal exceptions to rulings or orders of the court are unnecessary under Rule 46, F.R.C.P., it is still necessary that the objecting party make known to the court “* * * his objection to the action of the court and his grounds therefor; * * *” Rule 46, F.R.C.P. Out of fairness to the trial court, the objection should be sufficiently specific to focus attention on the error, if any, so as to permit correction.

We submit that the mere statement by counsel that he demanded more challenges “as a matter of right” was not a sufficient compliance with Rule 46. It was in the nature of a general objection, unavailable for review on appeal. Had he stated a basis for the alleged “right,” such as “The defendants feel there are 3 cases being tried here and we should have challenges in each of them,” or, “there are two defendants here, Your Honor, and their defenses are antagonistic,” then some specific question would have been before the Court.

“It is not permissible to so frame an objection that it will serve to save an exception for the action of a court of review and yet conceal the real complaint from the trial court.” *Maulding v. Louisville & N. R. Co.* (CCA 7th, 1948) 168 Fed. 2d 880, 882.

See, also, *Barron & Holtzoff*, Federal Practice and Procedure, Vol. 2, Sec. 1021, Notes 5 and 6 and cases cited.

(c) We agree with the appellant that the number of peremptory challenges to which defendant was en-

titled is governed by Sections 55-7-41 and 55-7-50, A.C.L.A. 1949, rather than by the Federal statute (28 U.S.C., Sec. 1870). This is, in fact, one basis for distinguishing all of the cases cited by appellant's brief under the heading "Rule of Hillmon Case," as all of these cases involved the application of 28 U.S.C., Sec. 1870 (Br. 22-23).

On the other hand, courts construing the provisions of statutes similar or identical to the Alaska law have held that, regardless of the number of parties on one side of the case, all must join in the permitted peremptory challenges. *Colfax Nat. Bank v. Davis Implement Co.* (Wash., 1908) 96 Pac. 823; *Crandall v. Puget Sound Traction L. & P. Co.* (Wash. 1913) 137 Pac. 319; *Switzer v. Atchison T. & S. F. R. Co.* (Cal., 1930) 285 Pac. 918.

(d) Rule 42(a) F.R.C.P. clearly contemplates three distinct courses which a court may follow when separately filed cases involve common questions of law or fact: (1) it may order a joint hearing or trial; (2) it may order all the actions consolidated; (3) it may make orders effecting savings in costs. In the instant case there was never any discussion of a "joint hearing or trial"; after the order of consolidation the consolidated "case" was thereafter referred to in the singular.

The test of whether these original actions were consolidated, we contend, is whether they *could* have been joined. Of this there can be no question. Rule 20(a) F.R.C.P. provides that all persons may join in one action as plaintiffs if they assert any right to relief,

jointly or severally, arising out of the same occurrence, giving rise to any common question of law or fact. This rule fits like a glove. Clearly all appellees could have joined in the same suit had they cared to do so. See, *Thompson v. United Glazing Co.* (D.C., W.D. N.Y., 1941) 36 Fed. Supp. 527.

The defendant cited numerous cases involving the failure to grant sufficient peremptory challenges in cases jointly tried, sometimes loosely referred to as consolidated for trial. We contend that these cases are clearly distinguishable. *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 188 U.S. 208, was a case in which cases were merely joined for trial. The cases could not have been consolidated under the rules as they then existed.

Other cases cited by appellant are equally distinguishable. The *Signal Mountain Portland Cement Company v. Brown* (CCA 6th, 1944) 141 Fed. 2d 471 case, and the case of *Davis v. Jessup* (CCA 6th, 1924) 2 Fed. 2d 433 are examples of separate cases tried together; they *were not* consolidated in any sense of the word. In *National Nut Co. v. Susu Nut Co.* (D.C., N.D., Ill. 1945) 61 Fed. Supp. 86, the cases tried jointly could not have been joined originally under Rule 20(a).

Certainly it would not seem to be the purpose of the Rules to increase the number of challenges permitted merely because the parties bring separate cases which are then consolidated, rather than initially joining in one original suit.

As the trial court said in the instant case:

“Thus it would appear that Section 55-7-50 governs, so far as peremptory challenges are concerned, where the actions are joined originally or, being such as could have been joined, are subsequently consolidated. It is clear, therefore, that if the actions here consolidated could have been joined under Rule 20(a) their subsequent consolidation under Rule 42(a) could in no wise enlarge the number of challenges under Section 55-7-50. It follows, therefore, that, since causes may be consolidated under Rule 42(a) (because of its broader language), that could not be joined initially under Rule 20(a), the parties are entitled to additional challenges only when the causes consolidated are of the latter class” (R. 53).

CONCLUSION.

In summarizing this case, appellees submit:

1. The court did not deny appellant peremptory challenges to which it was entitled in this consolidated case; the objection made to the court's action in this regard was insufficient to require review.
2. The instructions of the court were neither confusing nor erroneous; they were precise and proper statements of applicable legal principles.
3. There was ample and substantial evidence from which a jury of reasonable men could, and did, determine that appellant had failed in the high duty of care which it assumed in carrying passengers for hire; appellant was negligent.

We submit that the verdicts of the jury and the judgment of the lower court should not be disturbed. The judgment should be affirmed.

Dated, Anchorage, Alaska,
June 28, 1955.

Respectfully submitted,
WENDELL P. KAY,
STRINGER & CONNOLLY,
Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

COURT'S INSTRUCTIONS TO THE JURY.

No. 14.

Reckless driving is defined as follows:

“Any person who drives any automobile, motorcycle or other motor vehicle upon any public street or highway in this Territory, carelessly, heedlessly, or in wilful or wanton disregard of the rights or safety of others or without due caution and circumspection, or at a speed or in any manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving.”

It is further provided that:

“No person shall drive any motor vehicle upon any highway at a greater speed than is reasonable or prudent having due regard for the surface and the width of the highway and the traffic thereon, and in no event at a speed which endangers the safety of persons or property.”

and that the speed limit is 15 miles per hour

“When approaching any curve or any other part of the highway where the driver's view is obstructed within one hundred feet ahead.”

If you find that within 100 feet of the curve at which the collision occurred, the view of the bus driver or the truck driver was obstructed, the speed limit as to such driver would be 15 miles per hour. But if you find that it was not so obstructed, the governing speed limit at that time would be 35 miles per

hour, if you find it was posted for such speed; otherwise, the speed limit would be 50 miles per hour.

No. 18.

You are instructed that, in arriving at your verdict as to the amount of damages for permanent injuries, if any, resulting in a permanent loss of earnings by the plaintiff, if any, you may consider the mortality tables referred in evidence as tending to prove the life expectancy of the plaintiff, Dorothy Neal. Such tables are not binding, however, and you may determine such life expectancy from your own observations of the plaintiff, and such other assistance as you may obtain from the evidence, and all the facts and circumstances in evidence, including such tables. You have a right to consider the probabilities of accident, sickness, or other happenings reasonably likely to terminate the results of plaintiff's injuries.

In making an award for permanent loss of earning power, if any, the present worth of such award must be determined. The present worth of a sum of money payable in the future is such a sum as would, if put at simple interest, at the rate of return that a reasonable and prudent person would expect in making investments, amount to what the plaintiff, Dorothy Neal, could reasonably expect to earn during her life. To illustrate: the present worth of \$10,000 payable 20 years from today is determined by using the following formula:

$$\frac{\$10,000}{1 \text{ plus } 20 \text{ times } .04} = \frac{\$10,000}{1.8} = \$5,555.55$$

assuming that 4% interest would be the rate of return that a reasonable and prudent man would expect to obtain in making investments. It is for you to decide what that rate of return, or interest, would be, considering all the circumstances. Similarly the present worth of \$1000 to be paid over a period of 10 years, with an assumed safe investment rate of 5% is calculated by dividing \$1000 by the sum of one plus the number of years of life expectancy, times the investment rate or:

$$\frac{1000}{1 \text{ plus } (10 \text{ times } .05)} = \frac{1000}{1 \text{ plus } .05} = \frac{1000}{1.5} = \$666.66$$

After you have determined what the plaintiff, Dorothy Neal would earn during her life, you should determine the present value thereof according to the foregoing formula, and award her that sum, if you find her entitled to recover for loss of earning power.

SEC. 50-1-4 ALASKA COMPILED LAWS ANNOTATED 1949.

Powers and duties of Board of Road Commissioners.

* * *

(f) *Rules and regulations governing use of roads and highways.* To promulgate rules and regulations governing the use of the roads and highways as to—

(1) speed limits on straight-of-ways, curves and otherwise;

- (2) approaching vehicles;
- (3) overtaking vehicles;
- (4) sounding of horn;
- (5) prohibiting passing on curves;
- (6) prohibiting following too closely;
- (7) making turns to the right or the left;
- (8) signals on starting, stopping and turning;
- (9) right-of-way between vehicles including arterial highways as well as other roads;
- (10) parking, and
- (11) such other phases of traffic control as the Board deem necessary or advisable.

* * *

(h) *Publication and distribution of rules and regulations: Agreements with Federal agencies.* To publish, in pamphlet form, the rules and regulations promulgated and distribute the same free of charge to the traveling public through such appropriate officers or agencies as it shall designate for the purpose; Provided, that as to the promulgation and enforcement of all of its standards, rules and regulations the Board is empowered to enter into agreement with, and otherwise cooperate with all of the Federal agencies referred to in * * * Compiled Laws of Alaska, 1949, Section 41-2-2 and fire patrol system of the Department of Interior.

* * *

REGULATIONS ON TRAFFIC CONCERNING SPEED.

SPEED LIMITS

No person shall drive any motor vehicle upon any highway at a greater speed than is reasonable or prudent having due regard for the surface and the width of the highway and the traffic thereon, and in no event at a speed which endangers the safety of persons or property.

The following limitations under various conditions shall be deemed as reasonable and prudent:

(a) Fifteen Miles per Hour.

1. When passing an approaching vehicle upon any road having a width of less than eighteen feet between shoulders.

2. When crossing a bridge or highway intersection if during the last one hundred feet of the approach to such crossing the driver does not have a clear and unobstructed view of at least four hundred feet ahead.

3. When approaching any curve or any other part of the highway where the driver's view is obstructed within one hundred feet ahead.

4. When passing a school building during school hours or when children are going to or leaving school.

(b) Twenty-Five Miles per Hour.

1. On any part of any road having a width of less than sixteen feet between shoulders.

2. On any section of any road where there are numerous curves and where the driver's view is obstructed within a distance of three hundred feet ahead.

3. Except as provided in (a) 2 above when crossing any highway bridge having a greater length than fifty feet.

4. For any freight carrying vehicle having a gross weight of more than twelve thousand pounds.

(c) Fifty Miles per Hour.

1. Unless posted for less 50 miles per hour shall be deemed reasonable and prudent on any section of any highway not affected by such limitations as width and surface conditions of the roadway, curves, grade crossings and bridges or other considerations making speed restrictions necessary and shall constitute the maximum speed for any road or highway in the Territory.

2. No driver shall drive at a speed faster than that at which the vehicle can be stopped within the distance of the clear road visible ahead. Provided, however, that the Board may, in its discretion, designate highways or sections of highways where further speed limitations may be imposed.

United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY LINES, INC., a corporation,
Appellant,

vs.

DOROTHY NEAL and NATHANIEL NEAL, JR., *Appellees.*

MATANUSKA VALLEY LINES, INC., a corporation,
Appellant,

vs.

BLANCHE THOMAS, *Appellee.*

MATANUSKA VALLEY LINES, INC., a corporation,
Appellant,

vs.

WORDIE FRAZIER and PRINCE FRAZIER, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, THIRD DIVISION

REPLY BRIEF FOR APPELLANT

MARTIN & SHORTS
Seattle, Washington.

FRANK J. CONWAY,
Seattle, Washington

HELLENTHAL, HELLENTHAL &
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EVANDER CADE SMITH,
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United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY LINES, INC., a corporation,	vs.	Appellant,	} No. 14529
DOROTHY NEAL and NATHANIEL NEAL, JR.,		Appellees.	

MATANUSKA VALLEY LINES, INC., a corporation,	vs.	Appellant,	} No. 14530
BLANCHE THOMAS,		Appellee.	

MATANUSKA VALLEY LINES, INC., a corporation,	vs.	Appellant,	} No. 14531
WORDIE FRAZIER and PRINCE FRAZIER,		Appellees.	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF ALASKA, THIRD DIVISION

REPLY BRIEF FOR APPELLANT

I. The District Court Erred In:

1. Denying appellant's motion to dismiss at the close of appellees' case, on the grounds that appellees had presented insufficient evidence of negligence on the part of Matanuska to constitute a *prima facie* case
2. Denying appellant's motion for directed verdict on the grounds that appellees had not presented sufficient evidence of negligence on the part of Matanuska to justify submission of the case to the jury
3. Denying appellant's motion to set aside verdict and

any judgment entered thereon, or in the alternative, motion for a new trial, on the grounds that there was not sufficient evidence to support the verdict.

Appellees assert (Br. p. 6) that there were many contradictions and disputed issues presented to the trial court, and conclude that there was ample evidence to justify the verdict and judgment. Certainly there were disputed issues. Of course the testimony of each witness varies in some degree from that of others who took the stand. But it must be remembered that appellees had the burden of proof to sustain. This, the record indicates, they failed to accomplish.

First, the testimony of each and every witness indicates that this collision occurred on Matanuska's side of the highway. The disinterested investigating officer, Keith F. Boyd, put this question to rest as follows:

“Q. Does your report not show the incident to have occurred clearly on one side of the highway, Mr. Boyd?

A. I believe so. The point of impact, I believe, was on my report, shown on the east.” (R. 97)

The question was not leading. Its import is plain. And the officer was called as witness by appellees—not by Matanuska.

Second, the Matanuska driver had no notice that the oncoming truck would fail to negotiate the turn, cross the center line and tear the bus side with its bed. Appellees' principal witness, Reverend Johnson, asserted at pages 145-6 of the record:

“When it was seen that the truck was not turning to its right as it should and that we were to be hit, the bus driver was helpless to avoid the acci-

dent because we were already as far over on our side of the road without going into the ditch.”

Appellees’ brief makes no effort to explain this testimony. Perhaps it speaks all too clearly for itself. And this evidence, so damaging to appellees’ case, came from the lips of their own witness.

In appellant’s opening brief (p. 9-10), reference is made to the familiar rule that a motorist travelling in a proper manner on his own side of the highway is entitled to assume that an oncoming vehicle will not suddenly turn across his path or into the side of his automobile. Appellees do not question the rule. Rather they attempt to avoid it by describing the approaching Williams’ truck as an “approaching danger.” Nowhere, however, do they point to evidence showing that the Matanuska driver had notice a reasonable time prior to the impact that Williams would not negotiate the curve. That was the crucial time. And it is upon a survey of conditions as they existed at *that* time that we must judge Matanuska’s driver.

Let us suppose, however, for argument’s sake only, that Matanuska should have been aware, at a reasonable time prior to impact, that Williams would cross the center line into Matanuska’s lane of travel. What duty was then imposed on Matanuska? Appellees assert several such duties (Br. p. 5, 8). They state that the bus should have been brought to an immediate stop. The record, however, suggests otherwise (R. 347):

“No, if I had stopped the bus at that time she would have hit me on the front side where the driver sits, but I did manage to turn it enough so she grazed along the side of the bus . . . ”

Alternatively, appellees would require Matanuska to apply the bus brakes. On cross-examination, however, Lois Olson explained why she did not do so.

“Q. Now, did you attempt to apply your brakes?

A. No, because I was trying to get out of her way. If I had stopped, she would have hit the bus harder. This way she just grazed the side.” (R. 368)

Appellees attempt to impose a third duty upon the Matanuska driver when they brand it negligence for her to have failed to sound the bus horn. Not only is this requirement rather tardily imposed, but no attempt is made to indicate in what way the sounding of a horn would have obviated the accident; there is no claim of proximate causation, nor any showing thereof. How many times appellate courts have pointed out that the law does not require the doing of the useless.

Finally, appellees further suggest that perhaps the negligence of Matanuska might be founded upon the speed of the bus. Notice how far the bus travelled after impact (100 feet), they point out. Candor should cause appellees to admit that a short and simple explanation exists for this rather appreciable distance that the bus traveled before coming to rest. On cross-examination, the Matanuska driver testified:

“Q. Now, did you attempt to apply your brakes after the impact?

A. Yes, I did, but my air pressure was knocked out. It didn't do any good.

Q. Your brakes were gone. Is that right?

A. Yes, because she cut the air line.” (R. 369)

The evidence of negligence on the part of Matanuska,

so necessary to warrant submission of the case to the jury, is not present in the record.

We respectfully submit that the doctrine of *res ipsa loquitur* is not available to appellees to fill this deficit. While it is true that some jurisdictions have applied the doctrine to collision cases, the better reasoned and majority view is to the contrary. Blashfield, Cyc. of Auto. Law and Practice (Perm. Ed.) Sec. 6046, p. 456. As there stated :

“The rule will not be applied where the evidence discloses that the injury might have occurred by reason of the concurrent negligence of two or more persons or causes, one of which was not under the management and control of the defendant . . . ” See also *Estes v. Estes*, Mo. App., 127 S.W.2d 78; *Welch v. Greenberg*, 235 Iowa 159, 14 N.W.2d 266; *Jackson v. Martin*, 69 Ga. App. 344, 79 S.E.2d 406; *Hickory Transfer Co. v. Nezbed*, 202 Md. 205, 96 A.2d 241; *Vaughn v. Huff*, 186 Va. 144, 41 S.E.2d 482; 1 Shearman & Redfield, Law of Neg. (6th Ed.) Sec. 58b, p. 131.

In reviewing cases concerning the applicability of *res ipsa loquitur* to collision cases wherein a carrier is one of the defendants, it is pointed out at 161 A.L.R. 1116:

“However, the applicability of the doctrine of *res ipsa loquitur* has been denied in a number of later cases involving actions by passengers on common carriers to recover for injuries sustained in a collision between the vehicle of the carrier and a vehicle not under the carrier’s control.

“Thus there are several Pennsylvania cases in which the court denied the applicability of the rule on the theory that a presumption of negligence on

the part of the carrier would not arise unless it appeared that the accident was caused by something connected with the means or appliances of transportation, and that the mere happening of the collision does not raise a presumption of negligence (Cases cited).''

Other jurisdictions which have denied the applicability of *res ipsa loquitur* in situations involving a carrier's collision with another vehicle include California, Florida, Illinois, Kansas, Maryland, Missouri, Nebraska, North Dakota, Ohio, Virginia and Washington. See 161 A.L.R. 1116.

Even California, the state from whence emanate many of the *res ipsa loquitur* cases relied upon by appellees, would not apply the doctrine to the instant fact pattern. In *Gritsch v. Pickwick Stages System* (1933) 131 Cal. App. 744, 22 P.2d 554, the court, while recognizing the rule as applicable to many cases of this type, held that it did not apply where the evidence showed that the other vehicle (*i.e.*, the non-carrier) was clearly negligent. In the *Gritsch* case, *supra*, the vehicle which failed to observe the traffic sign was the car which collided with the bus upon which plaintiffs were passengers.

In Matanuska's case, the vehicle which crossed the center line and brought about a collision on the wrong side of the road was not the bus, but rather the Williams' truck. Clearly the *res ipsa* doctrine should not be invoked here.

Although appellees argue (Br. p. 18) that the doctrine of *res ipsa loquitur* properly applied to the instant facts (Br. p. 19), they state that they did not rely on

this doctrine in the trial court. We respectfully direct this court's attention to the argument of Mr. Kay to the court in opposition to appellant's motion for a directed verdict (R. 312, 313), when he stated:

"Another bus-truck collision in which the court approved the *res ipsa loquitur* instructions and held that the mere proof of the injury and the fare-paying passenger status were sufficient to go to the jury . . . "

It appears that appellees did rely on *res ipsa* in the trial court, but now retreat from that position, knowing full well that the doctrine cannot be properly applied to the facts of this collision.

In this reply brief, as in appellant's opening brief, principal attention and emphasis has been placed upon the facts of this accident. Appellate decisions concerning somewhat similar situations, such as those cited by appellees, are of little assistance to this court. The question of whether *this* record contains substantial evidence to support the verdict must, we respectfully submit, be answered negatively.

II. The District Court erred in giving the portions of Instruction No. 14 (R. 515-516) set forth in Appellant's Opening Brief, p. 16

The instruction given by the court speaks for itself. It was erroneously given for the reasons set forth in our opening brief. Colloquy between court and counsel (R. 501-504) strikingly illustrates the air of confusion which fostered the giving of this instruction. Appellant's detailed exception thereto appears at page 497 of the record.

III. The District Court erred in giving the portions of Instruction No. 18 (R. 519-521) set forth in Appellant's Opening Brief, pp. 18-19

It was and is appellant's position that this instruction patently confused the jury because of its extremely technical nature. It, too, speaks for itself. The confusion it engenders is, we submit, obvious. That jury members, without assistance of an accountant, could gain understanding or derive assistance from it seems incredible.

IV. The court erred in limiting the number of peremptory challenges allowed defendants (Br. p. 20 ff.)

Appellees seeks to avert meeting this question head-on. Rather, they assert, in effect, that while appellant might have been entitled to additional peremptory challenges, this right was conditional on good cause being shown.

As indicated in the discussion of this question in appellant's opening brief, these peremptory challenges are not conditional. Appellants contended in the lower court, and here reiterate, that they were entitled to the additional challenges as a matter of right, and not of grace. We submit that the cases cited in our opening brief clearly substantiate this contention.

Respectfully submitted,

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No. 14,532

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

I. H. SPEARS,

Appellant,

vs.

TRANSCONTINENTAL BUS SYSTEM, INC.,

Appellee.

REPLY BRIEF OF APPELLEE.

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FILED

DEC 29 1954

PAUL P. O'BRIEN,
CLERK

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TRANSCONTINENTAL BUS SYSTEM, INC.,

Appellee.

REPLY BRIEF OF APPELLEE.

Statement of the Case.

In March, 1953, plaintiff, a negro, purchased a ticket from defendant, Transcontinental Bus System, Inc., which provided for transportation by bus from San Francisco, California to New Orleans, Louisiana and return [Rep. Tr. p. 22, line 22, to p. 23, line 6; Tr. of Rec. p. 34, line 26, to p. 35, line 5]. Plaintiff boarded the bus in Los Angeles, California [Rep. Tr. p. 23, lines 8-10] and rode in the fourth seat from the driver to Winona, Mississippi, at which point the driver of the bus forced him to move to the rear seat of the bus where other negroes were sitting [Rep. Tr. p. 23, line 8; p. 27, line 24].

Alleging this was a violation of his civil rights plaintiff filed this action for damages against Transcontinental

Bus System, contending that defendant's employee committed the alleged wrong [Tr. of Rec. pp. 2-4].

Defendant's answer and its admissions later filed, denied the incident was occasioned by its employees and that it occurred in any territory served by it or on any bus under its control [Tr. of Rec. pp. 20-21; Exs. 7 and 9].

Trial resulted in judgment for defendant [Tr. of Rec. p. 37], which judgment was based on Findings of Fact and Conclusions of Law [Tr. of Rec. pp. 34-36].

The Evidence.

Rex S. Fifield, traffic manager, and Arthur Nay, general manager of the western division of defendant were called by plaintiff under Rule 43(b), Federal Rules of Civil Procedure.

They established that several different companies controlled the operation of the bus on plaintiff's route [Rep. Tr. p. 12, line 6, to p. 13, line 6; p. 45, line 6, to p. 47, line 15]. This testimony showed that at Winona, Mississippi, where the alleged discrimination occurred, the bus was under the control of Continental Southern Lines [also see Rep. Tr. p. 16, line 19, to p. 17, line 8].

Continental Southern Lines is a separate corporation, of which defendant Transcontinental Bus System owned the controlling stock interest [Rep. Tr. p. 19, lines 2-8; p. 75, lines 10-15].

The revenue from the fares allocated to the portion of the route served by Continental Southern Lines was received wholly by Continental Southern [Rep. Tr. p. 47, line 25, to p. 48, line 7].

Continental Southern Lines was operated by its own directorship and the rules and regulations of the various companies as to direction and control of bus operators were made by the directors of the separate corporations [Rep. Tr. p. 47, line 21, to p. 49, line 1].

There were no contractual agreements between Continental Southern Lines and Transcontinental Bus System as to transportation of passengers except as found in the National Tariff Authority [Rep. Tr. p. 42, line 6, to p. 44, line 10].

The ticket which Mr. Spears purchased contained the following provision:

“In selling this ticket and checking baggage, the selling carrier acts only as agent and is not responsible beyond its own lines” [Rep. Tr. p. 52, lines 7-16].

This same provision was set out in the National Passenger Tariff A-1000, Section A-1, Rule No. 6, which authority was filed with and had the approval of the Interstate Commerce Commission [Rep. Tr. p. 50, line 22, to p. 52, line 5].

Mr. Spears admitted that he had read that provision on other tickets he had purchased and he assumed it was on the ticket he was using for the trip in question [Rep. Tr. p. 34, line 2, to p. 36, line 2].

Mr. Spears testified he was not riding on the same bus he had boarded in Los Angeles when the alleged incident occurred, having changed buses at Hot Springs, Arkansas [Rep. Tr. p. 37, lines 1-17].

ARGUMENT.

I.

There Was No Error by the Trial Court in Respect to Appellant's Request for Admission Under Rule 36 or Appellee's Responses Thereto.

We are not quite certain of the point appellant is seeking to raise by his brief relating to this question. His argument is found at pages 11 and 12 of his opening brief on appeal.

The transcript of the trial shows that appellant made 33 requests for admissions. 27 of these were answered by appellee. The hearing was had on objections to the balance, after which hearing additional admissions were filed. These admissions were introduced in evidence as Exhibits 8 and 9 [Rep. Tr. p. 96, line 4, to p. 97, line 22]. These admissions have not been incorporated as part of the Transcript of Record on Appeal. In their essence it may be fairly said that they deny any exercise of authority by Transcontinental Bus System over the driver in charge of the bus on which Mr. Spears was riding at the time of the alleged discrimination at Winona, Mississippi. They simply raise an issue of fact which was the subject matter of the evidence received at the trial. This, of course, is the function of the procedure outlined by Rule 36 of the Federal Rules of Civil Procedure. Having complied with the rule, Appellee submits that there is no error in respect thereto either in procedure or in the manner in which the trial court considered the admissions as constituting evidence and creating issues of fact.

II.

The Court Did Not Err in Determining That Transcontinental Bus System, Inc., Was Not Liable for Alleged Discrimination.

The principal issue for determination in this case is whether Transcontinental Bus System, Inc., had control of, or were the operators of the bus at the time and place of the alleged discrimination. The Court found that it did not [Tr. of Rec. p. 35, line 19, to p. 36, line 7].

This finding is fully supported by the evidence and the law. The evidence showed that Transcontinental Bus System, Inc., did not operate buses at Winona, Mississippi, but that the bus on which plaintiff was riding at that time was being operated by Continental Southern Lines.

The fact that Transcontinental Bus System, Inc., owned the majority of the stock of Continental Southern Lines did not impose liability upon Transcontinental Bus System, Inc., for the acts of an employee under the control of Continental Southern Lines. The law is well established that mere stock ownership will not make the parent company liable for the acts of a subsidiary company.

In *Marr v. Postal Union Life Insurance Company*, 50 Cal. App. 2d 673, 681, the Court held:

“Before the Courts will disregard the corporate entity of one corporation and treat it as the *alter ego* of another, even though the latter may own all the stock of the former, it must further appear that there is such a unity of interest and ownership that the individuality of the one corporation and the owner or owners of its stock has ceased, and further, that the observance of the fiction of separate existence would under the circumstances sanction a

fraud or promote injustice. In other words, bad faith in one form or another must be shown before the Court may disregard the fiction of separate corporate existence."

In *Burkey v. Third Ave. R. Co.*, 244 N. Y. 84, 155 N. E. 58, 50 A. L. R. 599, plaintiff sued for injuries sustained while alighting from a street car operated by the Forty-second Street Company. Substantially all of the stock of that company was owned by defendant Third Ave. R. Co. It was contended that because of the common ownership the Third Ave. R. Co. was liable for the tort of Forty-second Street Company. At page 600 of the opinion as found in 50 A. L. R. the Court, speaking through Mr. Justice Cardozo, said:

"Stock ownership alone would be insufficient to charge the dominant company with liability for the torts of the subsidiary."

To the same effect is:

Philadelphia & Reading Railway Company v. McKibbin, 243 U. S. 264, 37 S. Ct. 280, 282.

In connection with recent antitrust litigation the distinct entity of separate corporation notwithstanding, common ownership of stock is clearly recognized. Examples of these cases are:

United States v. Yellow Cab Company, 332 U. S. 218, 67 S. Ct. 1560, 1566;

Kiefer-Stewart Company v. Seagram & Sons, 340 U. S. 211, 71 S. Ct. 259, 261;

Timken Roller Bearing Company v. United States, 341 U. S. 593, 71 S. Ct. 971, 974.

The law is also well-established that an issuing carrier is not responsible for the transportation of passengers beyond its own line. In *Louisville & N. R. Co. v. Chatters*, 279 U. S. 320, 49 S. Ct. 329, the plaintiff purchased a ticket and commenced his journey over the lines of Louisville & Nashville Railway. At New Orleans the operation was conducted by Southern Railway Co. as a connecting carrier. While on this operation plaintiff was injured when a window pane was broken. The Court held at page 332 as follows:

“Neither of them, as a common carrier, was under any duty, either by the common law or statute, to transport or assume any responsibility for the transportation of respondent beyond its own line.”

In *Solomon v. Pennsylvania Railway Co.*, 96 Fed. Supp. 709, Pennsylvania sold plaintiff a ticket for transportation from New York to Florida and carried plaintiff to Richmond, Virginia. At that point the train was taken over and operated by Atlantic Coast Line and thereafter plaintiff, a negress, was forced to move to a different car. The case was dismissed as to Pennsylvania Ry. Co. The trial court pointed out at page 710 of the opinion that Pennsylvania Ry. Co. was merely the agent for Atlantic Coast Lines in the sale of the ticket for that part of the journey made over Atlantic Coast Lines tracks and that none of the acts complained of were committed by Pennsylvania's employees.

The same rule was established in the early case of *Kirk v. Kimball*, 152 Cal. 180, 184.

In addition to the foregoing principles of law, it is well established that the published tariffs are part of a contract of carriage and that when such tariff limits the

responsibility of an originating carrier by a statement that it is not responsible beyond its own line, such provision becomes a part of the contract of carriage and is binding upon the carrier and its patrons. (*Louisville & N. R. Co. v. Chatters*, 279 U. S. 320, 49 S. Ct. 329, 332, wherein the identical limitations appeared in the tariff and ticket as we find in the case at bar.)

As above set out, in addition to the tariff provisions appearing on the ticket and the published tariff with the Interstate Commerce Commission, Mr. Spears testified to his knowledge that such provisions were on these tickets and that he assumed it was on the one by which he was riding at the time of the alleged incident.

The authorities cited under Points 2 and 3 of appellant's brief (pp. 12-17 thereof) were not in point to the factual situation in the case at bar. The portions of the Interstate Commerce Act cited at page 14 (49 U. S. C. A., Sec. 20, Subsec. 11) relate to carrying of freight and involve an entirely different statute rule. So likewise does the case of *Pacific etc. v. Minneapolis etc.*, 105 Fed. Supp. 794.

The case of *Harmon v. Barker*, 247 Fed. 1, cited on page 14 of Mr. Spears' brief is authority for the contention of defendant and appellee. It is there pointed out that the originating carrier would not be liable for a negligent injury to a passenger being carried by a connecting carrier.

The cases of *Kemp v. Transfer Co.*, 70 Fed. Supp. 521; *Hedges v. Johnson*, 52 Fed. Supp. 488; and *Emergency*

Corp. v. Weidenhouse, 169 F. 2d 405, all relate to situations where a lessee hauling under an I. C. C. truck permit of another cannot relieve the permittee from responsibility for the lessee's acts. There was no such proof in this case. The plaintiff did introduce certain rulings of the I. C. C. [Rep. Tr. p. 55, *et seq.*] but these only deal with the corporate relationship by way of stock ownership between the defendant and various subsidiary and affiliated companies. They do not deal with the question of control of transportation or responsibility [this was pointed out by the trial court, Rep. Tr. p. 55; p. 19, lines 5-12]. Neither do they purport to set out the franchise issued by the I. C. C. for bus operations in the territories in question.

III.

The Trial Court Neither Demonstrated nor Had Any Prejudice Against Appellant.

This is the last alleged error and appellant's discussion appears at page 17 of his opening brief. He cites no part of the record demonstrating his claim of prejudice of the trial court. We take opposition to appellant's statements, particularly in view of his failure to demonstrate by the record anything in support of his claim. We submit the record shows that the trial court was particularly solicitous to see that he understood the position of appellant and to see that appellant had full and complete opportunity to present all of the evidence to best support his cause of action.

Conclusion.

It is respectfully submitted that there were no errors at the trial and that the findings and judgment of the trial court are fully supported by the record of the testimony and the law applicable to this case.

Respectfully submitted,

SPRAY, GOULD & BOWERS,

By MALCOLM ARCHBALD,

Attorneys for Appellee.

No. 14533

United States
Court of Appeals
For the Ninth Circuit.

RUTH B. KERRY,

Appellant,

VS.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy
of Harold Edwin Kerry and the Community of
Harold Edwin Kerry and Ruth B. Kerry, His
Wife, Bankrupts,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Southern Division.

FILED

JAN 26 1955

PAUL P. O'BRIEN,

CLERK

No. 14533

United States
Court of Appeals
For the Ninth Circuit.

RUTH B. KERRY,

Appellant,

vs.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy
of Harold Edwin Kerry and the Community of
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[Clerk's Note: When deemed likely to be of an important nature. errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

STANLEY J. KRAUSE,
Becker Building,
Aberdeen, Washington.

In the District Court of the United States for the
Western District of Washington, Southern Di-
vision

In Bankruptcy No. 15920

In the Matter of:

HAROLD EDWIN KERRY, and the Community
of HAROLD EDWIN KERRY and RUTH
B. KERRY, His Wife,

Bankrupt.

PETITION TO HAVE TRUSTEE ABANDON
BURDENSOME ASSET AND PERMIT PE-
TITIONER TO FORECLOSE PLEDGE

To: O. M. Pitzen, Referee in Bankruptcy:

Comes now Ruth B. Kerry, Petitioner, and re-
spectfully shows to this Court and petitions as fol-
lows:

1. Bankrupt above named is a partner in that
certain partnership known as "West Tenino Lum-
ber Co." The said partnership is engaged in busi-
ness in Thurston County, State of Washington, and
was organized on December 30, 1952. Bankrupt's
interest in said partnership, pursuant to the terms
of the partnership agreement, is a 45/88ths interest
therein. Bankrupt is now and at all times since
December 30, 1952, has been such partner.

2. The above-mentioned partnership acquired all
the assets and the business of a West Tenino Lum-
ber Company, a corporation, which corporation was
dissolved on December 31, 1952. The partners had

been the owners of shares of stock in the corporation, and their stock ownership was in the same proportions as the interests they acquired and now hold in the partnership. They acquired their said interests in the partnership as a consequence of the said dissolution of the corporation and the transfer from the corporation to the partnership of the said business and assets.

3. Prior to the dissolution of the corporation, to wit, on or about July 28, 1952, Bankrupt pledged all of his shares of stock in the corporation to Petitioner to secure a loan of \$29,250.00 made by Petitioner to Bankrupt upon the execution of the said pledge. By a written instrument executed December 30, 1952, Petitioner agreed to permit the said pledged shares of stock to be voted for said dissolution of the corporation, and Bankrupt pledged to Petitioner all of Bankrupt's partnership interest when it should come into existence, and agreed to execute an assignment of such partnership interest to further evidence the said pledge. A copy of the said instrument is attached hereto, marked "Exhibit A," and by this reference is incorporated herein. On December 30, 1952, Bankrupt did execute an assignment of his said partnership interest to petitioner. A copy of said assignment is attached hereto, marked "Exhibit B," and by this reference is incorporated herein. Said pledge and assignment have been in existence at all times since said dates.

4. Bankrupt is, as of the date of this petition, indebted to petitioner upon the obligation secured

by the said assignment and pledge in the sum of \$29,250.00, together with interest at the rate of 6% per annum from July 28, 1952.

5. The value of the partnership interest of Bankrupt is now, and has been at all times subsequent to the date of the filing of the Petition for Adjudication of Bankrupt in this cause, substantially less than the sums owing to Petitioner herein upon the obligation secured by the said pledge and assignment. The value of Bankrupt's said partnership interest as shown in the November 30, 1953, balance sheet of said partnership, is \$23,482.25. A copy of said balance sheet is attached hereto, marked "Exhibit C," and by this reference is incorporated herein. The reasonable market value of the said partnership interest is substantially less than the aforesaid balance sheet figures, because the said balance sheet figures are based upon cost of assets less depreciation (in accordance with normal accounting practices) rather than upon an appraisal based upon present reasonable market values.

6. There is no net value or equity for the bankrupt estate in the aforesaid partnership interest of Bankrupt.

Wherefore, Petitioner prays that an order be entered herein:

(a) Authorizing and directing the Trustee in Bankruptcy herein to abandon the aforesaid partnership interest of Bankrupt as an asset of the estate for the reason that it is of no value to the

estate and it would be burdensome to the estate to participate in any foreclosure of Petitioner's pledge and assignment of said partnership interest;

(b) Permitting Petitioner to acquire by assignment and bill of sale from Bankrupt all of Bankrupt's right and title in and to the said partnership interest (or in lieu thereof, if Bankrupt fails or refuses to execute such assignment and bill of sale, to foreclose said pledge and assignment in a court other than this Court of Bankruptcy, without any necessity of joining the said Trustee as a party to such action); and

(c) Granting Petitioner such other and further relief as this Court deems just.

BOGLE, BOGLE & GATES,
Attorneys for Ruth B. Kerry,
Petitioner.

Duly verified.

EXHIBIT A

Agreement

This Agreement, made and entered into this 30th day of December, 1952, by and between Harold E. Kerry, herein called "Assignor," and Ruth B. Kerry, hereinafter called "Assignee,"

Witnesseth:

Whereas, on the 28th day of July, 1952, Assignor, being indebted to Assignee in the sum of Twenty-nine Thousand Two Hundred Fifty Dollars (\$29,-250), assigned to Assignee, as security for his note in said sum, Stock Certificate No. 70 for 90 shares of the common stock of West Tenino Lumber Company and Stock Certificate No. 10 for 135 shares of the stock of West Tenino Lumber Company; and

Whereas, it is the desire of the shareholders of West Tenino Lumber Company to dissolve said corporation; and

Whereas, Assignee is willing to allow the dissolution of said corporation provided that her security interest will be protected;

Now, Therefore, it is Mutually Agreed as follows:

1. Assignee does hereby authorize Assignor to vote his stock for the dissolution of West Tenino Lumber Company, a Washington corporation, provided that said dissolution and transfer of assets to the partnership is to be performed simultaneously therewith and the partnership is to be known as West Tenino Lumber Company.

2. Simultaneously with the release of said

pledge, Assignor shall execute an assignment to Assignee of all of his right, title and interest in said partnership as additional security for the payment of said promissory note, dated July 28, 1952, in the sum of \$29,250.

In Witness Whereof the parties hereto have caused this agreement to be executed the day and year first above written.

/s/ HAROLD E. KERRY,
Assignor.

/s/ RUTH B. KERRY,
Assignee.

State of Washington,
County of King—ss.

I, the undersigned, Notary Public in and for the State of Washington, do hereby certify that on this 30th day of December, 1952, personally appeared before me H. E. Kerry and Ruth B. Kerry, to me known to be the individuals described in and who executed the within instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and Official Seal this 30th day of December, 1952.

/s/ G. N. BENNETT,
Notary Public in and for the State of Washington,
Residing at Olympia.

EXHIBIT B

Assignment

H. E. Kerry does hereby assign and set over to Ruth B. Kerry all of his right, title and interest in and to the partnership known as West Tenino Lumber Company, which is a partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico. Said assignment is substituted security for that certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28, 1952, and which security is to act as continuing security for that certain note, dated July 28, 1952, until said note is paid in full.

Dated this 30th day of December, 1952.

/s/ H. E. KERRY.

EXHIBIT C

West Tenino Lumber Co.
Balance Sheet
November 31, 1953

Assets

Current Assets

Capital Br. Natl. Bank of Com.

\$ 26.60

Fixed Assets

Leasehold improvements

Cost
\$40,448.58

Dep. Res.
\$ 2,247.06

Net Value
\$38,201.52

Office building

1,874.81

55.44

1,819.37

Drying shed

702.47

6.00

696.47

Machinery and equipment

9,997.78

1,222.18

8,775.60

Fork Lift and carrier

4,559.60

2,089.74

2,469.86

Office equipment

282.70

55.44

227.26

Other Assets

Prepaid insurance

\$ 5,675.86

\$52,190.08

Miscellaneous receivables

\$ 1,586.02

\$ 1,689.54

Total assets

\$53,906.22

Ruth B. Kerry vs.

[Title of District Court and Cause.]

PETITION OF TRUSTEE TO HAVE REFEREE DETERMINE TITLE TO PROPERTY AND REQUIRE PERSONS IN POSSESSION TO TURN PROPERTY OVER TO TRUSTEE

To: O. M. Pitzen, Referee in Bankruptcy:

Comes now Joseph R. Schneider, Trustee, and respectfully shows to this court and petitions as follows:

1. Trustee denies each and every allegation contained in the petition of Ruth B. Kerry to have trustee abandon burdensome asset and permit petitioner to foreclose pledge.

2. That Harold Edwin Kerry and Ruth B. Kerry now are, and at all times material to this petition were, husband and wife.

3. That any and all pledges, assignments, promissory notes, or contracts alleged by Ruth B. Kerry to have been executed by Harold Edwin Kerry were made by the said parties when Harold Edwin Kerry and the marital community composed of Harold Edwin Kerry and Ruth B. Kerry were insolvent, and the same were made or executed without a fair consideration being paid.

4. That Harold Edwin Kerry and/or Ruth B. Kerry are now in possession of the following-described personal property which is not exempt by law and which said property at the time of the

filing of the petition for bankruptcy herein, was owned by Harold Edwin Kerry and/or the community of Harold Edwin Kerry and Ruth B. Kerry, said property being described as follows:

Household furniture and furnishings not set forth and described in Trustee's report on exemptions filed herein.

1947 Cadillac automobile,

1948 Chevrolet automobile.

5. That the schedules herein which are signed by Ruth B. Kerry are made a part hereof by this reference. That there are creditors of the same class as Ruth B. Kerry and that the effect of the pledges, assignments, promissory notes or contracts set forth by Ruth B. Kerry in her petition would be to give to Ruth B. Kerry a greater percentage of her claim than other creditors of the same class. That if any pledge or assignment was executed, as alleged by Ruth B. Kerry in her petition, the same was not completed within four months before the filing of the petition for adjudication as a bankrupt herein.

Wherefore, trustee prays that an order be entered herein:

(a) Determining the right, title or interest of Ruth B. Kerry and the Trustee in and to the alleged partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico, and the alleged pledge of property as set forth in the petition of Ruth B. Kerry.

(b) Determining the right, title or interest of

Ruth B. Kerry and the trustee in and to the following-described personal property:

Household furniture and furnishings not set forth and described in Trustee's report on exemptions filed herein.

1947 Cadillac automobile.

1948 Chevrolet automobile.

(c) Requiring Ruth B. Kerry and Harold Edwin Kerry to execute such papers as are necessary to transfer title to the above-described property to the trustee in bankruptcy.

(d) Requiring Ruth B. Kerry and Harold E. Kerry to turn over to the trustee such property as the referee determines is not exempt by law and is a part of the bankrupt estate herein.

(e) Granting Trustee such other and further relief as is deemed just.

/s/ STANLEY J. KRAUSE,
Attorney for Trustee.

Duly verified.

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

REPLY OF RUTH B. KERRY TO PETITION
OF TRUSTEE TO HAVE REFEREE DE-
TERMINE TITLE TO PROPERTY

To O. M. Pitzen, Referee in Bankruptcy:

Comes now Ruth B. Kerry, and replies to the petition served by the trustee herein on February 27, 1954, and entitled, "Petition of Trustee to Have Referee Determine Title to Property and Require Persons in Possession to Turn Property Over to Trustee."

For answer to paragraph 2, admits the same.

For answer to paragraph 3, denies each and every allegation contained therein, and particularly, and without limiting the generality of the foregoing, denies that pledges, assignments, promissory notes and agreements, or any thereof, were made or executed without fair consideration being paid, and specifically allege that all such pledges, assignments, promissory notes and agreements were made with respect to loans of moneys to Harold Edwin Kerry, the above-named bankrupt.

With respect to paragraph 4, denies each and every allegation thereof.

With respect to paragraph 5, denies each and every allegation thereof.

Wherefore, Ruth B. Kerry prays that an order

be entered granting her the relief requested in her petition of January 21, 1954, filed in this cause.

BOGLE, BOGLE & GATES,
Attorneys for Ruth B. Kerry.

Duly verified.

[Endorsed]: Filed March 15, 1954.

[Title of District Court and Cause.]

PROOF OF CLAIM IN BANKRUPTCY

State of Washington,
County of King—ss.

Ruth B. Kerry, being first duly sworn on oath, deposes and says:

1. That she is the Claimant herein, and resides at 201 West 14th Avenue, Olympia, Washington.

2. That the above-named Bankrupt was at and before the filing by him of the petition herein, and still is, and justly and truly indebted to Deponent in the sum of thirty-one thousand three hundred eighty-nine and 11/100ths (\$31,389.11) dollars for loans and advances to Bankrupt from a separate property of the Deponent; and that Bankrupt was at and before the filing of the petition herein and still is, justly and truly indebted to the Deponent in the sum of ten thousand six hundred seventy-seven and 76/100ths (\$10,677.76) dollars upon a promissory note, dated August 1, 1951, and executed by Olympic Stud Mill, Inc., and by Bankrupt, as

co-makers, for a loan in the said sum made by Deponent to the said Owner of Olympic Stud Mill, Inc., from separate funds of Deponent.

3. That the consideration of said debt is loans made by Deponent from her own separate funds to Bankrupt as follows:

October 27, 1948—Pursuant to promissory note attached hereto—loan of \$15,000.00 with interest thereon of 10%, on which balance owing is \$12,800.00, together with interest thereon from October 27, 1948, until paid.

April 11, 1949—Loan of \$1,089.11, no part of which has been paid, all of which is payable together with interest at 6% per annum from the date thereof until paid.

April 10, 1951—\$5,000.00 pursuant to promissory note attached hereto, no part of which is paid, all of which is due and payable together with interest at 6% per annum from date until paid.

February 26, 1951—Loan of \$5,000.00, no part of which has been paid, all of which is payable together with interest at 6% per annum from the date thereof until paid.

December 26, 1951—Loan of \$5,000.00, no part of which has been paid, all of which is payable, together with interest at 6% per annum from December 26, 1951, until paid.

April 17, 1953—Loan of \$2,500.00, no part of which has been paid, all of which is payable to-

gether with interest at 6% per annum from April 17, 1953, until paid.

Liability on aforesaid note of August 1, 1951, executed by Olympic Stud Mill, Inc., and the Bankrupt in the sum of \$10,677.76, all of which is due and payable, which note is filed with the receiver of Olympic Stud Mill, Inc., together with a credit owner's claim thereon.

4. That no part of said debt or liability has been paid except as above set forth.

5. That there are no set-offs or counterclaims to the said debt or liability.

6. That Deponent does not hold and has not, nor has any person by her order or to Deponent's knowledge or belief, or for her use, had or received any security or securities for said debt or liability. (The debts and liabilities above set forth are in addition to a secured obligation owing by Bankrupt to Deponent in the sum of \$29,250.00, upon a promissory note of July 28, 1952, secured by an assignment of a partnership interest of Bankrupt, and no claim is made herein with respect to the aforesaid note of July 28, 1952, for the reason that it is a secured note and Deponent is relying upon the security thereof.)

7. That the instruments (to wit: The promissory notes of October 27, 1948, and April 10, 1951), referred to above are attached hereto.

8. That the sums owing on the loans included in this debt became due upon the dates hereinabove

set forth; no note or other negotiable instrument has been received for such account or any part thereof except as hereinabove referred to; and that no judgment has been rendered thereon.

9. This claim is filed as an unsecured claim provided, however, that Deponent is expressly reserving her rights under the note of July 28, 1952, and the security therefore, and said note and said security are not made a part of this claim but are expressly reserved by the Deponent.

/s/ RUTH B. KERRY.

Subscribed and sworn to before me this 20th day of April, 1954.

[Seal] /s/ G. M. BENNETT,
Notary Public in and for the State of Washington,
Residing at Olympia.

Name: H. E. Kerry.

Due: Oct. 27, 1949.

Seattle, Washington, Oct. 27, 1948 \$15,000.00

One year after date, I promise to pay to the order of (Mrs.) Ruth B. Kerry, at Seattle, Fifteen Thousand and no/100 Dollars, for value received, with interest thereon at the rate of 10 per cent per annum from Oct. 27, 1948, until paid, interest payable monthly. Principal and interest payable in Lawful Money of the United States. For value re-

ceived, each and every party to this note binds himself, jointly and severally, hereon as principal and not as surety, and all parties hereto, including indorsers, sureties, and guarantors, hereby severally waive presentment, demand, protest, notice of non-payment hereof, any release or discharge arising from any extension of time, discharge of a prior party, or other cause other than actual payment in full hereof, and promises, in case suit is instituted to collect the same or any portion hereof, to pay such sum as the Court may adjudge reasonable in such suit as attorneys fees. At the option of the holder, the venue of any such suit may be laid in King County, Washington.

/s/ H. E. KERRY.

P. O. Address: 3301 White Bldg.

Tel. No.:

Date Paid: Nov. 12, 1951.

Interest Principal Pd.....\$ 1,000

Bal. of Principal..... 14,000

Date Paid: May 26, 1953.

Interest Principal Pd..... 1,200

Bal. of Principal..... 12,800

Bank No. Due on Demand, Seattle, Wash.,
April 10, \$5,000.00.

On demand, for value received, I promise to pay to the order of Ruth B. Kerry at the Seattle-First National Bank, at its Metropolitan Branch, Fourth Avenue and Union Street, Seattle, Washington, Five Thousand and no/100 Dollars with interest thereon from April 10, 1951, until paid at the rate of 6 per cent per annum, and if said principal and interest are not paid when this note becomes due; the interest shall then, and thereafter quarterly, be added to the principal sum and become a part of said principal, and said principal shall thereafter bear interest at the same rate. For value received, each and every party signing or indorsing this note waives presentment, demand, protest, and notice of non-payment thereof, binds himself as a principal, not as a surety, and promises to pay all costs of collection in case payment shall not be made at maturity; and further promises, in case suit is instituted to collect the same or any portion thereof, to pay such additional sum as the court may adjudge reasonable, as attorney's fees in such suit, and that at the option of the holder hereof the venue of said suit may be laid in King County, Washington.

H. E. KERRY CO.,

By /s/ H. E. KERRY.

Address: 3303 White Bldg., Seattle 1, Wash.

[Endorsed]: Filed April 20, 1954.

[Title of District Court and Cause.]

MEMORANDUM DECISION

Harold Edwin Kerry and the community of Harold Edwin Kerry and Ruth B. Kerry, his wife, filed their Petition in Bankruptcy on the 2nd day of October, 1953, and were adjudicated as such on the 5th day of October, 1953.

Prior to the filing of the Petition, the bankrupt, Harold Edwin Kerry, was a partner in a firm known as "The West Tenino Lumber Company" and owned a 45/88ths interest therein. The partnership was organized on December 30, 1952, on the same date that a corporation of the same name was dissolved. The partnership acquired all of the assets of the corporation and the shareholders became partners. Six months prior to the dissolution of the corporation, the petitioner, Ruth B. Kerry, made a cash loan of \$29,250.00 to the bankrupt, Harold Edwin Kerry, and bankrupt executed a promissory note and a pledge of his shares of stock to petitioner. On the date of the dissolution of the corporation, December 30, 1952, petitioner and bankrupt executed an agreement whereby petitioner permitted the pledged shares in "The West Tenino Lumber Company" to be voted in favor of a dissolution, in consideration of the simultaneous execution of the partnership agreement and the assignment to petitioner of bankrupt's interest as security for the \$29,250.00 loan. On the same day as the dissolution of the corporation was effected, the partnership

agreement was executed and the bankrupt executed the assignment of his partnership interest to petitioner in place and stead of his shares of stock in the former corporation, said assignment being as follows:

“Assignment

“H. E. Kerry does hereby assign and set over to Ruth B. Kerry, all of his right, title and interest in and to the partnership known as West Tenino Lumber Company, which is a partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico. Said assignment is substituted security for that certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28, 1952, and which security is to act as continuing security for that certain note, dated July 28, 1952, until said note is paid in full.

“Dated this 30th day of December, 1952.

“H. E. KERRY.”

No notice thereof was filed with either the County Auditor or the Secretary of State. All of the partners had actual notice of the pledge of bankrupt's interest in said partnership to Ruth B. Kerry, his wife, to secure the loan of \$29,250.00.

It is conceded that the loan was from Ruth B. Kerry's separate funds acquired by her from the estate of her former husband never commingled with the community property of petitioner and bankrupt. It is also admitted that the value of the partnership interest of the bankrupt at the date of filing of the

petition, and at all times since, has not exceeded \$22,000.00 and that no part of the principal or interest has been repaid.

The question to be determined is whether, under the strong-arm clause of the Bankruptcy Act, said assignment has any validity against the Trustee in Bankruptcy.

The above assignment cannot be deemed a mortgage as the same has no good faith affidavit nor was the same properly recorded within 10 days.

To be a valid pledge against a Trustee in Bankruptcy, the property pledged must be delivered to or the pledgee placed in possession of the pledged property. In *Hastings v. Lincoln Trust Company*, 115 Wash. 492, on page 499, the Court indicated that in such cases the security may be valid as between the parties but void as to the creditors of the debtor.

The Court said:

“It is elementary law that the delivery of pledged property by the pledgor to the pledgee is absolutely necessary to the life of the contemplated pledge. It is well said in *Security Warehousing Co. v. Hand*, 143 Fed. 32 (41):

“‘Delivery of possession is the very life of a pledge. No mere agreements respecting possession can create it. The contract of pledge cannot exist outside of the fact of change of possession.’ 21 R.C.L. 643.

“It is, of course, not necessary, under all circumstances, that the delivery be an actual

physical movement of the property from the hands or control of the pledgor to the pledgee; but it must in any event be of such nature that the control and dominion over the property passes from the pledgor into the absolute control and dominion of the pledgee. * * *"

In *Kietz v. Gold Point Mines, Inc.*, 5 Wash. (2d), page 229, the Court said:

(1) "In passing upon the question of necessity of delivery of personal property to complete a pledge, this Court stated in *Kuhn v. Groll*, 118 Wash. 285, 203 Pac. 44:

"It is true that the law requires a delivery of the pledged property from the pledgor to the pledgee and a retention of it by the pledgee in order to make the pledge fully effectual as security. We think the law applicable to the situation we find here is well stated in 21 R.C.L. 643, as follows:

"The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception, for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. If, however, the pledgee has the thing already in his possession, the very contract transfers to him, by operation of law, a virtual possession thereof as a pledge the moment the contract is completed.'

“Of like import, see *Hastings v. Lincoln Trust Co.*, 115 Wash. 492, 197 Pac. 627, 18 A.L.R. 583; *Bank of California v. Danamiller*, 125 Wash. 255, 215 Pac. 321, 36 A.L.R. 753; *Qualley v. Snoqualmie Valley Bank*, 136 Wash. 42, 238 Pac. 915; *Hodge v. Truax*, 184 Wash. 360, 51 P. (2d) 357, 103 A.L.R. 420.”

In the instant case, the pledgee, Ruth B. Kerry, was not placed in possession of any property whatsoever, except the pledge agreement, and she exercised no dominion or control over any of the property. The alleged pledgor continued to act as managing partner, the same as though the pledge had not been given, nor was the name of Ruth B. Kerry placed on the books of the partnership, or the alleged pledge filed with the partnership. However, the partners had oral knowledge of its existence. The pledgee not having any property in her possession or control, the alleged pledge is void as to a Trustee in Bankruptcy.

No case has been cited involving an attempted pledge of a partnership interest and defendant argues that the pledge in this case is similar to a pledge of an account receivable which our Supreme Court has recognized as valid although the pledgee was not placed in possession of the property pledged or an indispensable instrument representing the same.

R.C.W. 25.04.260, Nature of Partner's Interest in the Partnership. “A partner's interest in the partnership is his share of the profits

and surplus, and the same is personal property."

R.C.W. 25.04.270, Assignment of Partner's Interest.

(1) "A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignees, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled."

R.C.W. 63.16.010, Definitions.

(2) "'Assignment' shall include any transfer, pledge, mortgage, or sale of an account."

(1) "'Account' or 'Account Receivable' means an open book account, mutual account, or account stated, due or to become due, and not represented by a judgment, note, draft, acceptance, or other similar instrument for the payment of money; it includes rights under an unperformed contract written or oral for work, goods, or services which in the regular course will result in an account receivable; it excludes conditional sales contracts."

(6) “‘Filing Officer’ means the Secretary of State.”

R.C.W. 63.16.030, Notice of Assignment—Filing. “No assignment of an account shall be valid as against present or future creditors of the assignor, or as against a subsequent assignee of such account without knowledge of such assignment, unless such assignment shall be in writing and be signed by the assignor, and unless there shall be on file in the office of the filing officer, at the time of the making of such assignment or within ten days thereafter, an effective and uncanceled notice signed by the assignor and the assignee, in substantially the following form. * * *”

It appears that, under our Statute, the only assignable interest of a partner is his right to share in the profits and, upon dissolution, the proceeds, which is in reality “Ejusdem Generis,” an account receivable and, therefore, notice of said assignment, not having been filed with the Secretary of State, is void as to the Trustee.

An Order, after notice properly presented, will be entered sustaining Trustee’s Petition invalidating the pledge of Ruth B. Kerry as to the Trustee.

Dated at Tacoma in said District this 11th day of May, 1954.

/s/ O. M. PITZEN,
Referee in Bankruptcy.

[Endorsed]: Filed May 11, 1954.

[Title of District Court and Cause.]

MOTION ON BEHALF OF RUTH B. KERRY
FOR REHEARING

To the Honorable O. M. Pitzen, Referee in Bankruptcy:

Comes now Ruth B. Kerry, by Bogle, Bogle & Gates, her attorneys of record herein, and moves that the Referee reconsider her petition to have the Trustee abandon burdensome assets and to permit her to foreclose upon the security assignment of a certain partnership interest, and moves for a rehearing and reargument with respect thereto.

BOGLE, BOGLE & GATES,

/s/ ARTHUR G. GRUNKE,
Attorneys for Petitioner,
Ruth B. Kerry.

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This case came on for hearing before the undersigned Referee in Bankruptcy of the above-entitled Court, on the 18th day of March, 1954, upon the petition of Ruth B. Kerry to have the Trustee abandon the partnership interest of the bankrupts in The West Tenino Lumber Company, a partner-

ship, as an asset of the Estate, and the petition of the Trustee in Bankruptcy to have the Referee determine the interest of Ruth B. Kerry and the Trustee in The West Tenino Lumber Company, and the petitioner, Ruth B. Kerry, being present and represented by her attorney, Arthur G. Grunke, of Bogle, Bogle & Gates, and the Trustee in Bankruptcy being present and represented by his attorney, Stanley J. Krause, and witnesses having been sworn and testimony taken, and the Court being fully advised in the premises,

Now, Therefore, the Referee in Bankruptcy makes the following

Findings of Fact

I.

That Harold Edwin Kerry and the community of Harold Edwin Kerry and Ruth B. Kerry, his wife, filed their petition in bankruptcy herein on the 2nd day of October, 1953, and Harold Edwin Kerry and the said community was adjudicated bankrupt on the 5th day of October, 1953.

II.

That Joseph R. Schneider was duly appointed Trustee of the Estate of said bankrupt and on the 18th day of November, 1953, an order was signed approving the bond of Joseph R. Schneider as Trustee.

III.

That at the time of their filing of the petition in bankruptcy herein, the debts of the bankrupt

totalled \$148,153.14, and assets of the bankrupt totalled \$39,974.89. That one of the assets of the bankrupt at the time of the filing of the petition in bankruptcy herein was a 45/88ths interest in a partnership known as The West Tenino Lumber Company, which said interest at the time of the filing of the petition in bankruptcy was of the reasonable value of \$22,000.00, and which interest is now of the reasonable market value of \$22,000.00.

IV.

That on the 28th day of July, 1952, H. E. Kerry, in behalf of the marital community composed of H. E. Kerry and Ruth B. Kerry, his wife, borrowed \$29,250.00 from Ruth B. Kerry. That said loan was evidenced by a promissory note dated the 28th day of July, 1952, in the amount of \$29,250.00, payable to the order of Ruth B. Kerry and signed by H. E. Kerry. That the said sum of \$29,250.00 loaned by Mrs. Kerry, as aforesaid, was obtained by her from her own separate property, acquired from the estate of her former husband. No part of said loan has been repaid.

V.

That on the 28th day of July, 1952, H. E. Kerry, in behalf of the marital community, signed an agreement pledging certificates of stock in The West Tenino Lumber Company, a corporation, and pledging certain shares of stock of the Olympic Stud Mill, Inc., as security for the payment of the promissory note in the amount of \$29,250.00.

VI.

That on the 30th day of December, 1952, Harold Edwin Kerry and Ruth B. Kerry entered into a written agreement authorizing Harold Edwin Kerry to vote the pledged stock for the dissolution of the corporation, provided that the dissolution be simultaneous with a transfer of the corporate assets to a partnership to be known as The West Tenino Lumber Company. That said written agreement further provided that, simultaneous with the release of said pledge, H. E. Kerry shall execute an assignment to Ruth B. Kerry of all of his right, title and interest in The West Tenino Lumber Company, a partnership, as additional security until the payment of the promissory note in the amount of \$29,250.00.

VII.

That The West Tenino Lumber Company, a corporation, was dissolved and the corporate assets were transferred by bill of sale to the shareholders, namely, Harold Edwin Kerry, Charles L. Stickney, H. A. Preszler and Israel Torrico on the 30th day of December, 1952. That the bill of sale was filed in the office of the Auditor of Thurston County, Washington.

VIII.

That on the 30th day of December, 1952, simultaneously with the aforesaid dissolution and transfer of assets, a partnership agreement was executed between H. E. Kerry, Charles L. Stickney, H. A. Preszler and Israel Torrico, under the firm name of West Tenino Lumber Company, for the opera-

tion of a lumber business, and owning and operating the properties formerly owned by the corporation. That the properties of the partnership included a lumber mill in Tenino, Washington. That the partnership interests of the partners were in the same proportions to one another as was their ownership of stock in the corporation. The partnership agreement provided that H. E. Kerry owned 45/88ths of the capital and he was to share in the profits and losses of said proportion. The agreement named H. E. Kerry as managing partner and he was made responsible for the general management of the business. The partnership agreement provided that, in the event of the death of any partner, the partnership shall immediately terminate and the business transferred to a corporation, to be formed. The partners agreed that the estate of the deceased partner was to accept a proportionate share of the capital stock of the corporation in complete settlement of the deceased's account in the partnership. It was agreed that the common stock of the corporation was to be distributed to the partners, including the interest of the deceased partner, in the proportion in which the capital of the partnership is owned by the partners at the date of such transfer.

IX.

That on the 30th day of December, 1952, simultaneously with the aforesaid dissolution and transfer of assets, H. E. Kerry signed the following instrument, to wit:

“Assignment

“H. E. Kerry does hereby assign and set over to Ruth B. Kerry all of his right, title and interest in and to the partnership known as West Tenino Lumber Company, which is a partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico. Said assignment is substituted security for that certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28, 1952, and which security is to act as continuing security for that certain note dated July 28th, 1952, until said Note is paid in full.

“Dated this 30th day of December, 1952.

“/s/ H. E. KERRY.”

That the said instrument was executed and delivered pursuant to the aforesaid agreement of the same date, namely, December 30th, 1952, referred to in Paragraph VI above, and in consideration of the agreement to substitute the quoted instrument for the pledge of the Stock of this aforesaid corporation, The West Tenino Lumber Company, and in consideration further of the release of the Capital Stock of Olympic Stud Mill, Inc., from the pledge of July 28th, 1952. That on the 31st day of December, 1952, a Certificate of Firm Name was filed in the Office of the County Clerk of Thurston County, Washington, naming H. E. Kerry, Charles L. Stickney, H. A. Preszler and Israel Torrico as partners in The West Tenino Lumber Company. That no notice of the quoted instrument was filed with either

the County Auditor or the Secretary of State of the State of Washington. That the said Charles L. Stickney was advised, prior to the dissolution of the corporation, of the pledge of the said corporate stock, and the said Charles L. Stickney knew of the substitution of the substitution of the quoted instrument for the pledge of the said Capital Stock of The West Tenino Lumber Company.

X.

That Ruth B. Kerry was not placed in possession of any partnership property whatsoever, except the instrument quoted in Paragraph IX, and she exercised no dominion or control over any of the partnership property or any partnership interest of Harold E. Kerry. Harold E. Kerry acted as managing partner of the partnership. The name of Ruth B. Kerry was not placed on any of the books or records of the partnership, nor was the instrument quoted in Paragraph IX filed with the partnership.

XI.

That no instrument was filed in the Office of the Secretary of State of the state of Washington or in any office of the County Auditor or County Clerk of any county in the State of Washington showing that Ruth B. Kerry had a right, title or interest in The West Tenino Lumber Company, a partnership.

XII.

That the books of account of The West Tenino Lumber Company, a partnership, at all times showed that H. E. Kerry owned a 45/88ths interest

in the partnership, and from the above findings of fact, the Referee makes the following

Conclusions of Law

I.

That the interest of Harold Edwin Kerry, Harold E. Kerry or H. E. Kerry in the partnership known as The West Tenino Lumber Company is an asset of the bankrupt estate.

II.

That the unfiled instrument signed by H. E. Kerry on December 20th, 1952, purporting to set over a partnership interest in The West Tenino Lumber Company to Ruth B. Kerry is an incomplete pledge of an open book account and is not effective as against Trustee in Bankruptcy herein and the Trustee takes title to the said partnership interest free of any rights of Ruth B. Kerry under said instrument.

III.

That the 45/88ths interest of the bankrupt in the partnership doing business as The West Tenino Lumber Company is not a burdensome asset of the estate herein, and the petition of Ruth B. Kerry should be denied.

IV.

That upon dissolution of the partnership, doing business as The West Tenino Lumber Company, Joseph R. Schneider, as Trustee in Bankruptcy, is entitled to receive all right, title and interest in assets distributed as the result of the 45/88ths in-

terest appearing on the books and records of the partnership in the name of Harold Edwin Kerry, Harold E. Kerry or H. E. Kerry.

V.

That the effect of granting of Ruth B. Kerry's petition recognizing that she has a right, title or interest in The West Tenino Lumber Company, a partnership, in this proceeding would be to enable Ruth B. Kerry to obtain a greater percentage of her debt than some other creditor of the same class.

Done in Open Court this 11th day of June, 1954.

/s/ O. M. PITZEN,

Referee in Bankruptcy.

Presented by:

/s/ STANLEY KRAUSE.

It is stipulated that the foregoing may be entered forthwith and without further notice.

Dated June 10, 1954.

BOGLE, BOGLE & GATES,

Attorneys for Ruth B. Kerry.

[Endorsed]: Filed June 11, 1954.

In the District Court of the United States for the
Western District of Washington, Southern Division

In Bankruptcy No. 15920

In the Matter of:

HAROLD EDWIN KERRY, and the Community
of HAROLD EDWIN KERRY and RUTH B.
KERRY, His Wife,

Bankrupt.

ORDER

At Tacoma, in said District, on the 11th day of
June, 1954:

Ruth B. Kerry having filed her petition to have the Trustee abandon the partnership interest of the bankrupts in the West Tenino Lumber Company, a partnership, as an asset of the estate, and the Trustee having filed his petition to have the Referee determine the interest of Ruth B. Kerry and the trustee in the West Tenino Lumber Company, a partnership, and a hearing upon said petitions having been had whereat Ruth B. Kerry was present and represented by her attorney, Arthur G. Grunke, of Bogle, Bogle & Gates, and the trustee was present and represented by his attorney, Stanley J. Krause, and witnesses having been sworn and testimony taken, and the Referee having heard and considered the evidence, having made a Memorandum Decision, Findings of Fact and Conclusions of Law, now, therefore,

It Is Now Ordered:

I.

That the petition of Ruth B. Kerry be denied.

II.

That all right, title and interest in the partnership known as the West Tenino Lumber Company, appearing in the records of the partnership in the name of Harold Edwin Kerry, Harold E. Kerry or H. E. Kerry, is an asset of the bankrupt estate.

III.

That Ruth B. Kerry has no right, title or interest in the 45/88ths interest in the partnership known as the West Tenino Lumber Company appearing in the records of the partnership in the name of Harold Edwin Kerry, Harold E. Kerry, or H. E. Kerry.

IV.

That upon dissolution of the partnership doing business as West Tenino Lumber Company, Joseph R. Schneider as trustee in bankruptcy, is entitled to receive all right, title and interest in assets to be distributed as the result of the 45/88ths interest appearing on the books and records of the partnership in the name of Harold Edwin Kerry, Harold E. Kerry or H. E. Kerry.

Done in Open Court this 11th day of June, 1954.

/s/ O. M. PITZEN,

Referee in Bankruptcy.

Presented by:

/s/ STANLEY J. KRAUSE,

Attorney for Trustee.

It is stipulated that the foregoing may be entered forthwith and without further notice.

Dated June 10, 1954.

BOGLE, BOGLE & GATES,
Attorneys for Ruth B. Kerry.

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To O. M. Pitzen, Referee in Bankruptcy:

The petition of Ruth B. Kerry respectfully represents:

1. Your petitioner is aggrieved by the Order herein of O. M. Pitzen, Referee in Bankruptcy, entered June 11, 1954, a copy of which Order is annexed hereto, marked Exhibit "A" and made a part hereof, and by the Findings of Fact and Conclusions of Law entered on the same date, in connection with the said Order, a copy of which Findings of Fact and Conclusions of Law is attached hereto, marked Exhibit "B," and made a part hereof.

2. The Referee erred in respect to the said Findings of Fact, Conclusions of Law, and Order, in the following particulars:

(a) In stating in finding of fact number III that, at the time of the filing of the Bankruptcy

Petition herein, the assets of the bankrupt totalled \$39,974.89, and that one of said assets of the bankrupt was a 45/88ths interest in a partnership known as The West Tenino Lumber Company (which conclusion is not supported by the record herein and is contrary to the remaining findings of fact, which establish that the said partnership interest was assigned to petitioner; and which, furthermore, is a conclusion of law, and not properly a finding of fact); and in stating in the said finding of fact number III that the value of the said 45/88ths interest as of the date of the filing of the Bankruptcy Petition was \$22,000.00.

(b) In making conclusion of law number 1, stating that the interest of Harold Edwin Kerry in the said partnership is an asset of the bankrupt estate, for the reason that the said conclusion of law is contrary to the findings herein which establish that said interest was assigned to petitioner.

(c) In making conclusion of law number II, stating that the assignment of the said partnership interest is an incomplete pledge of an open book account and not effective as against the Trustee in Bankruptcy herein, and that the Trustee takes title to the said partnership interest free of any rights of Ruth B. Kerry, for the reason that the said conclusions are contrary to the findings of fact herein which establish that the transaction was not a pledge of an account receivable, but an assignment of partnership interest to petitioner.

(d) In making conclusion of law number III, stating that the 45/88ths interest of the bankrupt in the partnership is not a burdensome asset of the estate and that the petition of Ruth B. Kerry should be denied, for the reason that the findings of fact establish that the said petition should be granted, and that the debt secured by said assignment exceeds the value of said partnership interest, and there is no asset value in the said partnership interest for the estate herein; and for the reason that the said conclusions are not supported by the findings of fact nor by the record herein.

(e) In making conclusion of law number IV, stating that, upon the dissolution of the aforesaid partnership, the Trustee in Bankruptcy herein is entitled to receive all of the right, title and interest in assets distributed as a result of liquidation of the 45/88ths interest which Harold Edwin Kerry had assigned to petitioner, Ruth B. Kerry, for the reason that the findings of fact establish that Ruth B. Kerry is entitled, by virtue of the assignment and the Uniform Partnership Act, to the assets or proceeds of the said 45/88ths interest until she has received the sum of \$29,250.00, together with the interest on the note evidencing the same, and such other relief as the note provides, that the said 45/88ths interest is of a lesser value than the said sum of \$29,250.00, and that the Trustee consequently has no interest therein; and for the reason that the said conclusions are not supported by the findings of fact nor the record herein.

(f) In making conclusion of law number V, stating that the effect of granting the Petition of Ruth B. Kerry recognizing her rights under the assignment of the said partnership interest would be to enable her to obtain a greater percentage of her debt than some other creditor of the same class, for the reason that the assignment of the partnership interest conveyed to the said Ruth B. Kerry a property right and made her a secured creditor, and for the further reason that there are no findings of fact and there is nothing in the record herein to support any such conclusions as appear in conclusion of law number V.

3. The Referee erred in failing to enter conclusions of law stating substantially as follows:

(a) That on the date of the filing of the Bankruptcy Petition in the above-entitled cause, Harold Edwin Kerry was a partner in the partnership known as The West Tenino Lumber Company, and had theretofore, for good and valuable consideration, assigned his interest in the said partnership to petitioner, Ruth B. Kerry, and that any interest which the said Harold Edwin Kerry had in the said partnership was as of the date of the filing of the said Bankruptcy Petition, subject to the said assignment.

(b) That the aforesaid assignment of partnership interest from H. E. Kerry to Ruth B. Kerry, petitioner, is a valid and effective assignment and is a transfer so far perfected as to be valid and effective as against the Trustee in Bankruptcy herein, and that the rights of Ruth B. Kerry under and by

virtue of the said assignment of partnership interest are superior to the rights of the Trustee herein.

(c) That the value of the said 45/88ths interest in the aforesaid partnership was, as of the date of the filing of the Bankruptcy Petition in the above-entitled cause, and now is substantially less than the principal sum of \$29,250.00 owing to Ruth B. Kerry, and consequently, the estate has no interest in the said partnership which is of any value, and that to attempt to administer the said interest in the partnership would be burdensome to the estate.

(d) That the petition of Ruth B. Kerry should be granted and that the Trustee should be directed to abandon any claimed interest in the aforesaid partnership and that the petitioner, Ruth B. Kerry, be authorized and permitted to acquire by assignment and bill of sale from a bankrupt, by foreclosure of the said assignment, or otherwise, in any court of competent jurisdiction other than this court of bankruptcy, all interest in the said 45/88ths interest in the aforesaid partnership.

4. The Referee erred in failing to enter an order granting the Petition of Ruth B. Kerry, authorizing and directing the Trustee in Bankruptcy herein to abandon any claim with respect to the aforesaid partnership, for the reason that the same would be burdensome to the estate; and authorizing Ruth B. Kerry to acquire, by further assignment and bill of sale from the bankrupt, foreclosure or otherwise, in any court of competent jurisdiction other than this Court of Bankruptcy, all interest in and to the

said 45/88ths interest in the aforesaid partnership.

Wherefore, Petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to bankruptcy, that the said order be reversed, that Petitioner be granted the relief prayed for in her Petition of January 21, 1954, and referred to hereinabove, that an order be entered granting said relief, and that your Petitioner have such other and further relief as is just.

Dated: This 14th day of June, 1954.

/s/ RUTH B. KERRY,
Petitioner.

BOGLE, BOGLE & GATES,

/s/ ARTHUR G. GRUNKE,
Attorneys for Petitioner,
Ruth B. Kerry.

[Endorsed]: Filed June 15, 1954.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable George H. Boldt, United States
District Judge:

I, O. M. Pitzen, Referee in Bankruptcy in charge of this proceeding, do hereby certify that in the course of such proceedings an Order was entered herein denying the Petition of Ruth B. Kerry to abandon to her a 45/88ths interest in a partnership known as "The West Tenino Lumber Company" as a burdensome asset, or determining that the pledge

of said partnership interest is valid as to the Trustee; that thereafter, in due time, Ruth B. Kerry, feeling aggrieved by this Order, filed a Petition for Review thereof.

Summary of Facts

Ruth B. Kerry employed a court reporter to make a record of the proceedings and, after the Court had rendered its Memorandum Decision, a transcript of said proceedings was filed by Ruth B. Kerry and is attached hereto; and that thereafter the Court made and entered its Findings of Fact and Conclusions of Law and a summary of the facts are in the Referee's Memorandum Decision.

Question Presented

Is a pledge of an interest in a partnership as collateral for money loaned, without any filing or recording thereof, valid as to a trustee in bankruptcy.

Conclusion

My conclusion, as set forth in the Memorandum Opinion attached hereto is that an interest in a partnership is not capable of being pledged without notice thereof being filed with the Secretary of State, as the same would constitute a secret lien.

Papers Transmitted

I transmit herewith the following papers:

Petition to Have Trustee Abandon Burdensome Asset and Permit Petitioner to Foreclose Pledge.

Petition of Trustee to Have Referee Determine Title to Property and Require Persons in Possession to Turn Property Over to Trustee.

Reply of Ruth B. Kerry to Petition of Trustee to Have Referee Determine Title to Property.

Notice of Hearing Trustee's Petition to Void All Pledges, Assignments, Notes or Contracts, to Determine Title & Turn-Over.

Petitioner's Exhibit 1—Promissory Note.

Petitioner's Exhibit 2—Promissory Note.

Petitioner's Exhibit 3—Pledge Agreement.

Petitioner's Exhibit 4—Agreement.

Petitioner's Exhibit 5—Resolution for Voluntary Dissolution of West Tenino Lumber Company.

Petitioner's Exhibit 6—Partnership Agreement.

Petitioner's Exhibit 7—Bill of Sale.

Petitioner's Exhibit 8—Certificate of Firm Name.

Petitioner's Exhibit 9—Assignment.

Petitioner's Exhibit 10—Canceled check.

Memorandum of Authorities of Ruth B. Kerry.

Memorandum of Authorities of Trustee.

Reply Memorandum of Ruth B. Kerry.

Referee's Memorandum Decision.

Motion on Behalf of Ruth B. Kerry for Rehearing.

Findings of Fact and Conclusions of Law.

Order.

Petition for Review.

Court Reporter's Transcript of Testimony.

Dated at Tacoma, in said District, this 15th day of June, 1954.

/s/ O. M. PITZEN,

Referee in Bankruptcy.

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

MEMORANDUM DECISION

The "assignment" dated December 30, 1952, in fact is not an assignment but by its term purports to be a pledge of the bankrupt's partnership interest in West Tenino Lumber Company to secure indebtedness referred to in the document. Such character of the document was recognized by the parties in the hearing before the Referee (TR. 34) and acknowledged by petitioner's counsel at the argument in this Court. Unless the execution and delivery of such document created a valid and completed pledge petitioner is merely a general creditor of the bankrupt and she has no basis for claiming the partnership interest as security for her claim.

Washington law is controlling and under the Washington decisions there is no question but that to complete a pledge delivery of the pledged property is essential.

"In passing upon the question of necessity of delivery of personal property to complete a pledge, this court stated in *Kuhn v. Groll*, 118 Wash. 285, 203 Pac. 44:

" 'It is true that the law requires a delivery of the pledged property from the pledgor to the pledgee and a retention of it by the pledgee in order to make the pledge fully effectual as security. We think the law applicable to the situ-

ation we find here is well stated in 21 R.C.L. 643, as follows:

“ “ “The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception, for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. If, however, the pledgee has the thing already in his possession, the very contract transfers to him, by operation of law, a virtual possession thereof as a pledge the moment the contract is completed.” ’

“Of like import, see *Hastings v. Lincoln Trust Co.*, 115 Wash. 492, 197 Pac. 627, 18 A.L.R. 583; *Bank of California v. Danamiller*, 125 Wash. 255, 215 Pac. 321, 36 A.L.R. 753; *Qualley v. Snoqualmie Valley Bank*, 136 Wash. 42, 238 Pac. 915; *Hodge v. Truax*, 184 Wash. 360, 51 P. (2d) 357, 103 A.L.R. 420.”

In the last cited decision the same rule was applied in a case involving a chose in action wherein it was said:

“One of the prime requisites of a pledge is that the pledgor has parted with his property and that the pledgee has possession or control over it.” *Hodge v. Truax*, *supra*.

From the record and the unchallenged facts found by the Referee it is clear that the partnership interest of the bankrupt was not relinquished by the bankrupt or delivered to Mrs. Kerry. Accordingly,

no valid pledge was completed under Washington law.

The foregoing view of the matter makes it unnecessary to consider whether an incompleated pledge of a partnership interest is within the Washington definitions of either chattel mortgage or accounts receivable.

Petition for review denied and the order of the Referee dated June 11, 1954, sustained.

Dated at Tacoma, Washington, this 28th day of July, 1954.

/s/ GEORGE H. BOLDT,
United States District Judge.

[Endorsed]: Filed July 30, 1954.

United States District Court, Western District of
Washington, Southern Division

In Bankruptcy—No. 15920

In the Matter of:

HAROLD EDWIN KERRY, and the Community
of HAROLD EDWIN KERRY and RUTH B.
KERRY, His Wife,

Bankrupt.

ORDER

At Tacoma, in said District, on the 12th day of
August, 1954.

Ruth B. Kerry, having filed a petition for review
of findings of fact, conclusions of law and order of

O. M. Pitzen, Referee in Bankruptcy, entered June 11th, 1954, and the said Referee having certified and transmitted to this Court the record of proceedings of the said Referee, and both the petitioner and the Trustee in Bankruptcy having filed a memorandum of points and authorities with reference to said petition for review, and a hearing having been held before the undersigned Judge of the above-entitled court, at which time the record certified and transmitted in bankruptcy was considered and argument having been made for and in behalf of the petitioner by Arthur G. Grunke, of Bogle, Bogle & Gates, attorneys for petitioner, Ruth B. Kerry, and argument having been made for and in behalf of the Trustee by Stanley J. Krause, his attorney, and the Court having made and filed his Memorandum Decision wherein petition for review was denied, and Order of the Referee dated June 11th, 1954, was sustained, and the attorneys for the petitioner having made a motion for rehearing of her petition for review, and the Court being fully advised, now, therefore,

It Is Hereby Ordered, that Ruth B. Kerry's motion for a rehearing is denied.

It Is Further Ordered that the petition of Ruth B. Kerry for a review of the Findings of Fact, Conclusions of Law and Order of the Referee in Bankruptcy, dated June 11th, 1954, is denied, and the said findings of fact, conclusions of law and order of the Referee herein dated June 11th, 1954, is hereby approved, affirmed and sustained.

Dated at Tacoma, Washington, this 12th day of August, 1954.

/s/ GEORGE H. BOLDT,
United States District Judge.

[Endorsed]: Filed and entered August 12, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Ruth B. Kerry, the Petitioner named in that certain Petition for Review in the above-entitled Bankruptcy Cause, and in the proceeding and controversy commenced therein by her Petition to have Trustee abandon burdensome asset and permit Petitioner to foreclose pledge, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Order of the said United States District Court, entered in favor of Joseph R. Schneider, Trustee in Bankruptcy (Appellee) on August 12, 1954, in the said proceeding and controversy, which Order involves more than Five Hundred Dollars; and the said Petitioner does further appeal to the said United States Court of Appeals from the Order made by the Honorable O. M. Pitzen, Referee in Bankruptcy for the said District and Division, and entered in favor of said Appellee in the said Cause on June 11, 1954, from which said Order the afore-said Petition for Review was filed, and with respect

to which said Order the aforesaid Final Order of the said United States District Court was entered on August 12, 1954.

BOGLE, BOGLE & GATES,
/s/ ARTHUR G. GRUNKE,
Attorneys for Petitioner,
Ruth B. Kerry.

Affidavit of Mail attached.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Ruth B. Kerry, as principal, and American Bonding Company of Baltimore as surety, are held and firmly bound unto Joseph R. Schneider, Trustee in Bankruptcy for the above-entitled bankrupt estate, his successors and assigns, to which payment well and truly to be made we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Done this 8th day of September, in the year of our Lord, one thousand nine hundred and fifty-four.

Whereas, in the above-entitled Court and Cause a Final Order was entered against the said Ruth B. Kerry, and in favor of the said Joseph R. Schneider, Trustee in Bankruptcy, as aforesaid, and

the said Ruth B. Kerry filing in said Court a Notice of Appeal to reverse the aforesaid Final Order by an appeal to the United States Court of Appeals for the Ninth Circuit,

Now, Therefore, the condition of the above obligation is such that, if the said Ruth B. Kerry will pay all costs should the said appeal be dismissed or the said Final Order be affirmed, or such costs as the Appellate Court may award should the said Order be modified, then the above obligation is to be void, but otherwise to be and remain in full force and effect.

/s/ RUTH B. KERRY.

AMERICAN BONDING
COMPANY OF BALTIMORE,
Surety;

By /s/ R. N. WELLER,
Attorney-in-Fact.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

MOTION FOR TRANSMITTAL OF EXHIBITS

The Petitioner, Ruth B. Kerry, respectfully moves that an Order be entered under Rule 75(i) for the transmittal of the original exhibits introduced in the proceedings in the above-entitled matter before the Referee in Bankruptcy on March 18, 1954, and transmitted to and filed with the above-

named District Court with said Referee's Certificate on Review, filed in the above Cause with the said District Court on June 15, 1954, to the Clerk of the United States Court of Appeals for the Ninth Circuit.

This motion is based upon the records and files in this case and the Affidavit of Arthur G. Grunke, hereto attached.

Dated: September 9, 1954.

BOGLE, BOGLE & GATES,

/s/ ARTHUR G. GRUNKE,

Attorneys for Petitioner,

Ruth B. Kerry.

Affidavit

State of Washington,
County of King—ss.

Arthur G. Grunke, being first duly sworn, on oath deposes and says:

That this affiant is one of the attorneys of record for Ruth B. Kerry, the Petitioner, who has given Notice of Appeal to the Court of Appeals for the Ninth Circuit in the matter referred to in the foregoing Motion for Transmission. That the exhibits introduced in evidence in this matter, and specified in Appellant's Designation of Record on Appeal, are the basis of Appellant's Petitions filed in the said proceeding, and could be determinative of the

rights of the parties to the proceeding, and it is highly advisable that the said original exhibits be before the Court of Appeals in order that it may have them available for such use or review as it may deem appropriate.

/s/ ARTHUR G. GRUNKE,

Subscribed and sworn to before me this 9th day of September, 1954.

[Seal] /s/ M. B. CRUTCHER,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 17, 1954.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF EXHIBITS

The Motion of Ruth B. Kerry, Petitioner and Appellant in certain proceedings in the above-entitled Bankruptcy Cause, for the transmittal of original exhibits in said proceedings, to the Clerk of the United States Court of Appeals for the Ninth Circuit, under Rule 75(i), Rules of Civil Procedure, having been presented to this Court, and it appearing that the said Motion was duly served on Joseph

R. Schneider, Trustee in Bankruptcy of the above-named bankrupt and Stanley J. Krause, his attorney of record herein, and the Court being fully advised in the premises,

It Is Ordered, that the original exhibits in the above-entitled matter, with respect to that proceeding therein which was tried before the Honorable O. M. Pitzen, Referee in Bankruptcy, on March 18, 1954, and which exhibits were duly transmitted to and filed with this Court, with said Referee's Certificate on Review, in the said proceeding in the above-captioned matter, on June 15, 1954, be transmitted to the United States Court of Appeals for the Ninth Circuit as part of the record on appeal, to be returned to this Court when and as directed by the said Court of Appeals.

Done in open Court this 20th day of September, 1954.

/s/ GEORGE H. BOLDT,
District Judge.

Presented by:

ARTHUR G. GRUNKE, of
BOGLE, BOGLE & GATES,
Attorneys for Ruth B. Kerry
(Petitioner and Appellant).

Approved for Entry:

/s/ STANLEY J. KRAUSE,
Attorney for Trustee in
Bankruptcy.

[Endorsed]: Filed September 20, 1954.

In the District Court of the United States for the
Western District of Washington, Southern Division

In Bankruptcy No. 15920

In the Matter of:

HAROLD EDWIN KERRY, and the Community
of HAROLD EDWIN KERRY, and RUTH B.
KERRY, His Wife,

Bankrupt.

TRANSCRIPT OF PROCEEDINGS

Before O. M. Pitzen, Esq., Referee in Bankruptcy,
in the Federal Building at Tacoma, Washington, on
March 18, 1954.

Appearances:

The petitioner, Ruth B. Kerry, appearing
and being represented by Arthur G. Grunke,
Esq., of the law firm of Bogle, Bogle & Gates;
and

The trustee appearing and being represented
by Stanley J. Krause, Esq.

Thereupon, the following proceedings were had
and done and testimony given, to wit:

The Referee: Mr. Krause, we have two or three
matters, I guess, which one did you wish to take up
first? Do you have it?

Mr. Krause: I think that your petition is
the——

Mr. Grunke: I believe that they're all inter-related.

Mr. Krause: All primarily the same thing.

Mr. Grunke: It might help if I could tell you just somewhat how they do inter-relate, and whether they were inter——

The Referee: Well if you would, yes.

Mr. Grunke: I'd have to review the files.

The Referee: It'd probably be a good idea if you would; or we'd never know where we got them.

Mr. Grunke: All right.

The Answer primarily of the petition of Ruth B. Kerry who's the wife of the man—as your Honor, will recall, we had Mr. Kerry and the community adjudicated as a bankrupt. Mrs. Kerry in her own individual name as such did not ever petition nor was she ever adjudicated. She has had such properties and on occasion will be adjudicated individually.

The petition that we have in court was a [2*] petition by Mrs. Kerry, to have certain property which was assigned to her. The basis for our petition is this; to call for the petition to direct the trustee to abandonment of certain properties burdensome so that we won't have to go into any foreclosure proceedings enjoining trustee and so on, just adding expenses to the bankrupt estate for no purpose. And our petition states two grounds that are in conjunction; namely, number one the property, a partnership interest in a partnership in which Mr. Kerry was a partner, that the partnership interest was assigned to Mrs. Kerry as security

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

for a loan. And number two, the values of the partnership interest is substantially less than the balance owing on the loan, which the assignment of the partnership interest secures.

So, consequently it's our petition that this partnership interest that the trustee be authorized and directed by this Court to give up all claims to the partnership interest. The trustee obviously has not done so and obviously would not do so without a court order and just what defenses to our petition or what he might contend to the contrary, I just do not know, but at any rate we desire a court order to clear the bankrupt estate from that [3] partnership interest on the theory that, and on the ground that the value will be substantially less than the amount which has been secured so there's no need actually for the bankruptcy estate and then Mrs. Kerry can either foreclose or whatever she needs to do to clear up Mr. Kerry's interest and realize what she can on this bankrupt—on this partnership interest.

Mr. Kerry was a partner in a corporation known as West Tenino Lumber Company. Prior to that the business had been—the business was incorporated originally. Then it was—in December of '52, it was dissolved, the corporation was dissolved, and a partnership was established on the same day and Mr. Kerry became a partner along with the other shareholders in the same proportions at which they held stock.

Mrs. Kerry—the stock in the corporation had been pledged to Mrs. Kerry, while the corporation was

still in existence some 6 months or so prior to its dissolution. She had made a loan of cash to Mr. Kerry, the details will come out in the evidence, but as the evidence will show, she made a cash loan to pick up the bank loan that Mr. Kerry owed her, which was called, and the stock was pledged to her. It previously had been pledged to the bank, and she was [4] given a note for the amount of the money she actually acquired and put up.

When the corporation was dissolved all the documents, the files will show, were simultaneous. The corporation was dissolved on December 30th, which was the same day that Mrs. Kerry and Mr. Kerry executed an agreement, which permitted Mr. Kerry to vote the stock for dissolution and by the terms of the same agreement created a pledge in Mrs. Kerry of the partnership, of the interest Mr. Kerry was a partner. It was a partnership interest. And on that same day also Mr. Kerry executed a separate document called an assignment to effect such a partnership interest. Also——

The Referee: Pardon me, but maybe we're getting off the record. I just want to know which one of you is going to speak up first, so we get the record straight. Then, if you will, we'll get this thing going.

Mr. Grunke: But, then there are in this——

The Referee: Well, will you reserve your statement until we get the——

Mr. Grunke: Oh——

The Referee: ——I just asked you which one of these procedures you wanted to get going, if [5] that would make any difference——

Mr. Grunke: Excuse me. Excuse me, I'm sorry.

The Referee: So for the record here. At this time I take up the petition to have trustee abandon burdensome assets and permit petitioner to foreclose his place. And the records show that Mr. Harold Edwin Kerry is present in person and also Ruth B. Kerry is present in person and being represented by their attorney——

Mr. Grunke: That's correct. Grunke. G-r-u-n-k-e.

The Referee: Mr. Grunke.

The trustee——

Mr. Krause: Joseph Schneider. Mr. Schneider.

The Referee: What is his full name?

Mr. Schneider: J. R. Schneider.

The Referee: J. R. Schneider, being present in person and being represented by his attorney, Stanley Krause.

Is there anyone else?

Are you appearing?

Mr. Preszler: Just as a witness, your Honor. [6]

Mr. Grunke: But that in substance is the gist of our plea that the interest was assigned and I will substantiate that then after the bankruptcy and the debt is secured. And it is in order for the trustee as quickly as can be done to abandon the encumbered property.

And our witnesses will be Mr. Kerry and Mrs. Kerry, who will testify to the common facts outlined in the brief, and that we have certain documentary evidence also and so, shall we proceed with the testimony then?

The Referee: Yes, please.

Mr. Grunke: Mr. Kerry, would you take the stand, please. [7]

HAROLD EDWIN KERRY

called as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grunke:

Q. Will you state your name, please?

A. Harold Edwin Kerry.

Q. That's spelled, K-e double r-y? A. Yes.

Q. And you are the husband of Ruth B. Kerry, may I ask? A. Yes.

Q. And you are also the bankrupt named in this proceeding? A. Yes.

Q. Now, Mr. Kerry, you had some connection with a business known as West Tenino Lumber Company, did you not? A. Yes.

Q. Would you tell us, as of during the year 1952, what your interest in that company was and what was the nature of it?

A. In 1952 the West Tenino Lumber Company, was a corporation in which I owned something over 51 per cent, a fraction over 51 per cent of the stock.

Q. That was 51 point 13, I believe.

A. 51 point 13 or 14; between those two [8] figures.

Q. And you were a shareholder in the corporation, to that extent? A. Yes.

Q. And who were of the other shareholders?

(Testimony of Harold Edwin Kerry.)

A. Other shareholders in 1952 were C. L. Stickney, Israel Torrico, Mr. Charles Preszler. That's all.

Q. And did you have any office or other position with the corporation other than shareholder?

A. Yes, I was president of the company.

Q. And you were a director?

A. And a director.

Q. Now, calling your attention to the summer of 1952—July of 1952, were there any transactions with respect to your shares of stock in the corporation?

A. Yes. In July—I think it was July of 1952, the bank who held my stock as security for the purchase of the interests of a former partner of mine, who had died a couple of years before that called the loan, which balance of the loan at that time amounted to \$29,250.

Q. That was a loan secured by what?

A. A loan secured by the West Tenino stock, and stock in the Olympic Stud Mill.

Q. The Olympic Stud Mill is a separate corporation? A. A separate corporation, yes.

Q. And so that your shares of stock in the [9] two corporations were pledged to which bank?

A. They were pledged to the Trust Department of the First National Bank, in Seattle.

Q. Seattle First National? A. Yes.

Q. And do you know approximately when that pledge to the bank was made?

(Testimony of Harold Edwin Kerry.)

A. The pledge to the bank was made in either '51 or '52, shortly after the death of my partner.

Q. You say it was either '50 or '51?

A. '50, or '51, yes, sir. That is correct.

Q. Now in 1952, what action did the bank take with respect to that loan and the purported pledge?

A. In July of '52, the bank called me and said that they were going to call the loan and sell out the stock at that time.

Q. What was done then, in view of that——

A. Then Mrs. Kerry decided that she would sell some of her securities and step into the shoes of the bank and take over the pledges that the bank had.

Q. And was that accomplished?

A. That was accomplished in July of '52.

Q. And how much money did Mrs. Kerry put up?

A. She put up \$29,250.

Q. And to whom was that money paid by Mrs. Kerry? [10]

A. That was a cashier's check, payable to the First National Bank of Seattle.

Q. Did you furnish that \$29,250 to Mrs. Kerry?

A. No, that came entirely from Mrs. Kerry's own funds.

Q. Did you furnish any part of it?

A. No part of it at all.

Q. Showing you what has been marked for identification, Mr. Kerry, as Petitioner's identification number 1, which is an instrument dated August of 1950, just tell us what that instrument is?

(Testimony of Harold Edwin Kerry.)

A. This is a promissory note dated August 15th, 1950, for \$75,000——

Q. Payable to whom?

A. Payable to the First National Bank of Seattle, as executor of the last will of John X. Johnson, of Johnson deceased.

Q. And that is the loan that you speak of that you owed to the bank. It is with respect to the West Tenino, and the loan that's written up here for a pledge? A. Yes.

Q. To the bank? A. That's correct.

Q. And that is the loan which—were payments made on that loan?

A. Yes. Payments were made on that loan. [11]

Q. And it was paid down then to what balance?

A. And the balance was settled as of \$29,250.

Q. I see.

So the loan of \$75,000, had been paid down considerably between August, 1950, and July of '52?

A. Yes.

Q. And then in July of '52, there was that balance of——

A. That was the total amount, yes.

The Referee: We'll just take a short recess.

(Recess.)

Q. Now Mr. Kerry, showing you what has been marked for identification as Petitioner's identification number 2, a document dated July 28th, 1952, can you tell us what that document is?

A. Yes. This is a note for \$29,250, dated July

(Testimony of Harold Edwin Kerry.)

28th, 1952, made payable to the order of Ruth B. Kerry and signed by me.

Q. And in what connection was that note made?

A. That note was made for the \$29,250 Mrs. Kerry paid to the First National Bank, in settlement of my note to the First National Bank.

Q. In other words the transaction you've just been testifying about? [12] A. Yes.

Q. And that note was signed by whom?

A. That's signed by me.

Q. That's Exhibit 2.

Now, identification number 1, is signed by whom?

A. That's signed by me, also.

Q. And I notice there's also a signature "H. E. Kerry Company," by you.

A. Also signed by—signed by H. E. Kerry Company by me, sole owner of H. E. Kerry Company.

Q. In other words H. E. Kerry Company was not a corporation or a partnership, is that right?

A. No, sole ownership.

Q. Yes. Now, Mr. Kerry, showing you what's been marked as Petitioner's identification number 3, can you tell us what that document is?

A. This is a pledge agreement entered into on the 28th of July, 1952, between me and Mrs. Kerry, the pledgee—

Q. And by whom was that—

A. —and executed by me and also by Mrs. Kerry.

Q. And what—by the terms of that document, what was the pledge? What assets were pledged?

(Testimony of Harold Edwin Kerry.)

A. The assets this—the stock in the West Tenino Lumber [13] Company was pledged to Mrs. Kerry.

Q. Was there anything else?

A. I don't—yes, and the—250 shares of the common stock in the Olympic Stud Mill as well, the corporation.

Q. What percentage of the Olympic Stud Mill stock did that represent?

A. That represented 50 per cent of the stock.

Q. And the stock in the West Tenino Lumber Company, was that all of your stock or a portion of it?

A. This was all of my stock in the West Tenino Lumber Company.

Q. In other words the 51 point 13 per cent interest that you had in the company? A. Yes.

Q. When was the pledge you gave, identification number 3, executed with respect to the time of the note? A. With respect to what?

Q. With respect to the note, identification number 2? A. At the same time.

Q. And were they executed before or after Mrs. Kerry put up the \$29,250?

A. They were executed at the time that Mrs. Kerry put up the \$29,250.

Q. I see.

In other words that was all done on the [14] same day, is that right?

A. Simultaneously.

Mr. Grunke: We'll offer identifications 1, 2, and 3, in evidence.

(Testimony of Harold Edwin Kerry.)

Mr. Krause: No objection.

The Referee: If there are no objections then identifications 1, 2 and 3 will be admitted in evidence as Exhibits 1, 2 and 3, Petitioner's Exhibits 1, 2 and 3.

(Whereupon, the documents referred to were marked and admitted into evidence as Petitioner's Exhibits Nos. 1, 2 and 3, respectively.)

PETITIONER'S EXHIBIT No. 1

Promissory Note

\$75,000.00

Seattle, Washington, August 15, 1950.

As herein provided, after date, without grace, I promise to pay to the order of Seattle-First National Bank, as Executor of the Last Will of John X. Johnson, Deceased, at Seattle, Washington, the sum of Seventy-five Thousand Dollars lawful money of the United States at the rate of Five Thousand Dollars (\$5,000.00), or more, quarterly, commencing on the 15th day of November, 1950, and each quarter thereafter until fully paid. The unpaid balance shall bear interest at the rate of five per cent (5%) per annum after declaration of default hereof, and said quarterly payments shall bear interest at the rate of five per cent (5%) per annum from maturity. All payments shall be applied first

(Testimony of Harold Edwin Kerry.)

on account of accrued interest and then on account of principal.

In the event of default in the payment of any of said payments herein provided for, the whole sum due hereunder shall become immediately due and collectible, at the option of the holder of this note, and in case suit or action is instituted to collect this note, or any portion thereof, I promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum as the court may deem reasonable as attorney's fees to be allowed in such suit or action, and the venue of any such suit may, at the option of the holder hereof, be laid in King County, Washington.

/s/ H. E. KERRY,

H. E. KERRY COMPANY,

By /s/ H. E. KERRY,

Sole Owner.

Received on Within Indebtedness

4-26-51	\$1,000.00
5-16-51	6,500.00
Sept. 28, 1951	2,500.00
May 5, 1952	5,000.00

[In longhand on face of original]: Satisfied—
7-29-52.

SEATTLE 1ST NATIONAL
BANK, EXEC.,

[Signature of Officer.]

[Endorsed]: Filed March 25, 1954.

(Testimony of Harold Edwin Kerry.)

PETITIONER'S EXHIBIT No. 2

\$29,250.00

Seattle, Washington

July 28, 1952.

For Value Received, Harold E. Kerry promises to pay to the order of Ruth B. Kerry the sum of Twenty-Nine Thousand Two Hundred Fifty Dollars (\$29,250.00), lawful money of the United States of America, with interest thereon in like money at the rate of five per cent (5%) per annum from the date hereof. This note is secured by a pledge from the undersigned to said Ruth B. Kerry, dated July 28, 1952. The terms and conditions of said pledge are incorporated herein and by this reference made a part hereof.

Interest shall be payable annually. The principal and all accrued interest shall be paid on or before July 28, 1957.

If default be made in the making of any payment provided for herein when due or in the keeping or performing of any term, condition, covenant or agreement to be kept and performed by the undersigned in accordance with said pledge agreement, then at the option of the holder of this note, without prior notice, the entire indebtedness evidenced hereby shall immediately become due and thereafter bear interest at the rate of ten per cent (10%) per annum.

(Testimony of Harold Edwin Kerry.)

If this note is placed in the hands of an attorney for collection after any default, whether suit be brought or not, the undersigned promises and agrees to pay all costs of collection including a reasonable attorney's fee and that at the option of the holder the venue of any such suit may be laid in King County, State of Washington.

Every person or party at any time liable for the payment of the debt hereby evidenced, waives presentment for payment, demand, protest and notice of non-payment of this note, and consents that the holder may extend the time of payment or otherwise modify the terms of payment of any part or the whole of the debt at any time at the request of any other person liable, and that further security of every type may be accepted, all without affecting the liability of such person or party in any way.

/s/ HAROLD E. KERRY.

[Endorsed]: Filed March 25, 1954.

(Testimony of Harold Edwin Kerry.)

PETITIONER'S EXHIBIT No. 3

Pledge Agreement

This Agreement made and entered into this 28th day of July, 1952, by and between Harold E. Kerry, hereinafter called "Pledgor" and Ruth B. Kerry, hereinafter called "Pledgee,"

Witnesseth

Whereas, Pledgee has advanced out of her own separate funds to Pledgor the sum of Twenty-Nine Thousand Two Hundred Fifty Dollars (\$29,250.00), in consideration of the execution and delivery of a certain promissory note of the Pledgor in favor of the Pledgee; and

Whereas, Pledgee demands collateral security to secure the payment of said note and Pledgor is willing to give such security;

Now, Therefore, in consideration of the foregoing recitations and of the mutual covenants hereinafter expressed it is Mutually Agreed as follows:

Article I. Note to Be Secured:

The promissory note to be secured is as follows:

One (1) promissory note, executed by Harold E. Kerry, dated July 28, 1952, payable to Ruth B. Kerry in the sum of Twenty-Nine Thousand Two Hundred Fifty Dollars (\$29,250.00), bear-

(Testimony of Harold Edwin Kerry.)

ing interest at the rate of five per cent (5%) per annum, said note maturing July 28, 1957.

Article II. Security:

To secure payment of said note Pledgor herewith deposits with and delivers to Pledgee the following property:

Certificate No. 7 for 90 shares of the common stock of West Tenino Lumber Company;

Certificate No. 10 for 135 shares of the common stock of West Tenino Lumber Company;

Certificate No. 2 for 250 shares of the common stock of Olympic Stud Mill, Inc.

Article III. Conditions:

(a) Pledgor agrees that upon breach of any of the conditions contained in the note described in Article II herein, or upon failure to pay said note when due, Pledgee may thereupon or at any time or times thereafter sell all or part of the security described in Article II herein, and any substitute therefor, and any additions thereto, at any broker's board or at public or private sale, without notice, advertisement or demand of any kind, and may apply the net proceeds, after deducting all costs and expenses for collection, sale and delivery, to the payment of said note, returning the residue to the Pledgor on demand.

Pledgee may purchase any of said property at any such broker's board or public or private sale.

(Testimony of Harold Edwin Kerry.)

(b) In the event of decline in the market value of said property pledged as security or any part thereof, the Pledgee may demand the pledge and delivery of additional property of quantity and amount satisfactory to Pledgee; and the failure on the part of the Pledgor to deliver such additional property on demand shall cause said note to become due and payable on demand.

(c) Upon full and complete payment of said note described in Article I herein, Pledgee shall immediately deliver up to Pledgor all collateral then remaining with Pledgee.

In Witness Whereof the parties hereto have caused this agreement to be executed the day and year first above written.

/s/ HAROLD E. KERRY,
Pledgor.

/s/ RUTH B. KERRY,
Pledgee.

Witness:

/s/ GEORGE R. DION.

Witness:

/s/ GEORGE R. DION.

(Testimony of Harold Edwin Kerry.)

Q. Now Mr. Kerry, calling your attention again to the business known as West Tenino Lumber Company. You stated that during 1952 it was a corporation. Is it still a corporation or did it cease at some time to be a corporation?

A. No, the corporation was dissolved on December 30th, 1952, and then it became a partnership with each one retaining the percentage of interest that the—their stock represented in the corporation.

Q. And in view of the fact that your shares of stock were pledged to Mrs. Kerry, how was the dissolution of the corporation accomplished?

A. Well, the corporation was dissolved with the permission [15] of Mrs. Kerry to—for me to vote for the dissolution under the pledge agreement.

Q. Was that permission and that arrangement oral or in writing?

A. That was in writing.

Q. Now Mr. Kerry, showing you what has been marked for identification as Petitioner's identification number 4, can you tell us without reading it, can you tell us what that document is?

A. This is an agreement between Mrs. Kerry and myself, Mrs. Kerry as assignee and myself as assignor——

Q. What does it accomplish, I mean, in a general way?

A. It assigned the—this authorized me to vote the stock of the corporation for dissolution.

Q. And did it do anything else?

(Testimony of Harold Edwin Kerry.)

The Referee: Pardon me. 4, that was authorization to vote the stock?

The Witness: Yes. This is the agreement in which I was authorized to vote the stock of the West Tenino Lumber Company, to transfer the assets to the partnership.

Q. And what else, if anything, did the agreement authorize?

A. Well then at the same time to execute an assignment to assignee of all rights, titles and interest in the [16] partnership.

Q. And that agreement is signed by whom?

A. That's assigned—that's signed by me as assignor and Mrs. Kerry as assignee.

Mr. Grunke: Perhaps, if the Court please, the two critical parts of the document should be read so that the—because I think this is one of the critical documents in this whole case, so the Court will have the advantage of it.

“After certain recitations the former pledges we made in July were as follows:” It goes on to state: “Now therefore it is mutually agreed as follows:

“Assignee”—and Mrs. Kerry is referred to as the assignee—“does hereby authorize and allow Mr. Kerry to vote this stock for the dissolution of West Tenino Lumber Company, a Washington corporation, provided that said dissolution and transfer of assets to the partnership is to be performed simultaneously therewith and the partnership is to be known as West Tenino Lumber Company.”

Paragraph II: “Simultaneously with the release

(Testimony of Harold Edwin Kerry.)

of said pledge assignor shall execute an assignment to assignee of all of his rights, titles and interests in said partnership as additional [17] security for the payment of said promissory note dated July 28th, 1952, in the sum of \$29,250.00, in witness whereof and so forth."

Q. Now, Mr. Kerry, was—can you tell us whether the corporation in fact dissolved or not?

A. Yes, it was.

Q. And I show you what has been marked for identification as Plaintiff's 5, which is a certified copy from the Secretary of State of a certificate of dissolution of a corporation.

Would you read that and tell us whether—if you recognize whether or not it relates to West Tenino Lumber Company, the corporation you have referred to?

A. You want me to read the document?

Q. Yes, just read it to yourself and tell us whether it relates to this dissolution we have been referring to.

A. It certifies—it resolved that the West Tenino Lumber Company be wound up and dissolved out of court, and this dissolution did take place.

Q. So this is the resolution that was adopted and filed with the Secretary of State for the dissolution of your company?

A. That's correct.

Q. Of the company in which you were a shareholder.

And showing you what has been marked as [18]

(Testimony of Harold Edwin Kerry.)

Petitioner's identification 6, without reading it to us, just what is that document?

A. This is the partnership agreement between the partners of the West Tenino Lumber Company.

Q. And who are they?

A. The partners are: H. A. Preszler, Israel Torrico, C. L. Stickney and myself.

Q. And by whom is the document signed?

A. It was signed by all four of those partners.

Q. That you've just named? A. Yes.

Q. And does it specify your partnership interest? That is your percentage or fractional interest in the partnership? A. Yes, it does.

Q. And what does it specify?

A. It shows my interest at forty-five eighty-eight.

Q. And that works out percentagewise at 51 point 13—— A. 51 point 13.

Q. ——that figure you were talking about?

A. Yes.

Q. And did the partnership then do business as a partnership after that? A. Yes.

Q. Showing you what has been marked as [19] Petitioner's identification 7, which is a document certified by the County Auditor of Thurston County, can you tell us what that document is?

A. This is a bill-of-sale and transfer of assets and the liquidation of the corporation to the partnership.

Q. And it's signed by whom?

A. This is signed by me as liquidating trustee.

(Testimony of Harold Edwin Kerry.)

Q. You were the liquidating trustee of the corporation? A. Yes.

Q. And that transfers how much of the assets of the corporation to the partnership?

A. That transfers all of the assets of the corporation to the partnership.

Q. And showing you what's been marked as Petitioner's identification number 8, which is also a certified document from the Thurston County Clerk. Can you tell us in a general way what that is?

A. This is certificate of a firm name of the West Tenino Lumber Company.

Q. And it's executed by whom?

A. This is also signed by me and by Mr. Stickney, and by Mr. Torrico and Mr. Preszler. The four partners.

Q. Now showing you, Mr. Kerry, what has been marked as Petitioner's identification number 9, can you tell me what that is? [20]

A. Yes. This is the assignment wherein I assigned to Ruth B. Kerry, all of my rights, titles and interest in the partnership of the West Tenino Lumber Company.

Q. And whose signature is on that document?

A. That's my signature, and it's dated December the 30th, 1952.

Q. And as a matter of fact all of these documents you have been referring to, all have the date December 30th, 1952, do they not?

A. Yes, that's correct.

Q. And the Secretary of State's certificate with

(Testimony of Harold Edwin Kerry.)

respect to the dissolution certificate indicates that it was filed on December 30th, 1952?

Mr. Grunke: I'll offer identifications—Petitioner's identifications 4 through 9.

Mr. Krause: No objection.

The Referee: Being no objection, they'll be offered in evidence as Exhibits 4, 5, 6, 7, 8 and 9, the same identification numbers.

(Whereupon, the documents referred to were marked and admitted into evidence as Petitioner's Exhibits Nos. 4, 5, 6, 7, 8 and 9, respectively.)

PETITIONER'S EXHIBIT No. 4

Agreement

This Agreement, made and entered into this 30th day of December, 1952, by and between Harold E. Kerry, herein called "Assignor" and Ruth B. Kerry, hereinafter called "Assignee,"

Witnesseth

Whereas, on the 28th day of July, 1952, Assignor, being indebted to Assignee in the sum of Twenty-nine Thousand Two Hundred Fifty Dollars (\$29,250), assigned to Assignee, as security for his note in said sum, Stock Certificate No. 70 for 90 shares of the common stock of West Tenino Lumber Company, and Stock Certificate No. 10, for 135 shares of the stock of West Tenino Lumber Company; and

(Testimony of Harold Edwin Kerry.)

Whereas, it is the desire of the shareholders of West Tenino Lumber Company, to dissolve said corporation; and

Whereas, Assignee is willing to allow the dissolution of said corporation provided that her security interest will be protected;

Now, Therefore, it is Mutually Agreed as follows:

1. Assignee does hereby authorize Assignor to vote his stock for the dissolution of West Tenino Lumber Company, a Washington corporation, provided that said dissolution and transfer of assets to the partnership is to be performed simultaneously therewith and the partnership is to be known as West Tenino Lumber Company.

2. Simultaneously with the release of said pledge, Assignor shall execute an assignment to Assignee of all of his right, title and interest in said partnership as additional security for the payment of said promissory note dated July 28, 1952, in the sum of \$29,250.

In Witness Whereof the parties hereto have caused this agreement to be executed the day and year first above written.

/s/ HAROLD E. KERRY,
Assignor.

/s/ RUTH B. KERRY,
Assignee.

(Testimony of Harold Edwin Kerry.)

State of Washington,
County of King—ss.

I, the undersigned, Notary Public in and for the State of Washington, do hereby certify that on this 30th day of December, 1952, personally appeared before me H. E. Kerry and Ruth B. Kerry, to me known to be the individuals described in and who executed the within instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and Official Seal this 30th day of December, 1952.

[Seal] /s/ G. M. BENNETT,

Notary Public in and for the State of Washington,
Residing at Olympia.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 5

Certificate No. 27554

United States of America
State of Washington
Department [Seal] of State

To All to Whom These Presents Shall Come:

I, Earl Coe, Secretary of State of the State of Washington, and custodian of the Seal of said State,

(Testimony of Harold Edwin Kerry.)

Petitioner's Exhibit No. 5—(Continued)

do hereby certify that the annexed is a true and correct copy of the Resolution for Voluntary Dissolution of West Tenino Lumber Company, as received and filed in this office on December 30, 1952.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Washington. Done at the Capitol, at Olympia, this 12th day of March, A.D. 1954.

[Seal] /s/ EARL COE,
Secretary of State.

By /s/ RAY J. YEOMAN,
Assistant Secretary of State.

West Tenino Lumber Company
Resolution That Corporation Be Wound Up
and Dissolved Out of Court

Know All Men by These Presents:

That H. E. Kerry, C. L. Stickney and Israel Torrico, being a majority of the Directors of West Tenino Lumber Company, a corporation, hereby certify that the following is a true and correct copy of a resolution adopted by a unanimous vote of the Directors and Shareholders at a Shareholders and Directors' meeting duly called for that purpose and held on December 10, 1952, to wit:

(Testimony of Harold Edwin Kerry.)

Petitioner's Exhibit No. 5—(Continued)

“Resolved: That West Tenino Lumber Company, be wound up and dissolved out of court; that H. E. Kerry be and he is hereby designated as Trustee to conduct the winding up of the corporation in the manner provided by law; and that he is hereby authorized and directed to execute all documents and to do all things necessary to wind up the affairs of said corporation.

“Be It Further Resolved: That the dissolution be effective as of the close of business on December 10, 1952, and that the Trustee complete the transfer of all assets to the shareholders in cancellation of all of the issued and outstanding stock of the company as soon as possible, but in no event later than December 31, 1952.”

In Witness Whereof we have hereunto set our hands and seals this 10th day of December, 1952.

/s/ H. E. KERRY,

/s/ C. L. STICKNEY,

/s/ ISRAEL TORRICO.

State of Washington,
County of King—ss.

This Is to Certify that on this 10th day of December, 1952, before me, a notary public in and for the

(Testimony of Harold Edwin Kerry.)

Petitioner's Exhibit No. 5—(Continued)

said county and state, personally appeared H. E. Kerry, C. L. Stickney and Israel Torrico, to me known to be the individuals who executed the foregoing certificate and Directors of West Tenino Lumber Company, and acknowledged to me that they executed the foregoing instrument by authority and that the statements of fact contained therein are true and correct.

In Witness Whereof I have hereunto set my hand and official seal the day and year first shown above written.

[Seal] /s/ G. M. BENNETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

No. 122117

Voluntary Dissolution

Articles of Incorporation
of the

West Tenino Lumber Company

Place of business: Olympia.

Time of existence: Perpetual years.

Capital Stock: \$50,000.00.

State of Washington—ss.

Filed for record in the office of the Secretary of

(Testimony of Harold Edwin Kerry.)

Petitioner's Exhibit No. 5—(Continued)

State, December 30, 1952, at 2:00 o'clock p.m. Recorded in Book 45, Pages 294-296, Domestic Corporations.

/s/ EARL COE,
Secretary of State.

Filed at request of:

C. L. Stickney,
521 Security Bldg.,
Olympia, Washington.

Filing and recording fee, \$5.00.

Certificate mailed Jan. 8, 1953.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 6

Partnership Agreement

This Agreement of Partnership, made and entered into this 30th day of December, 1952, by and between H. E. Kerry, Charles L. Stickney, Israel Torrico and H. A. Preszler,

Witnesseth

Whereas, the parties hereto desire to form a partnership to be known as West Tenino Lumber Company;

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

Now, Therefore, the parties hereto agree that they are, by affixing their signatures hereto, general partners in the business and for the purpose and upon the terms hereinafter stated:

Article I. Name:

The firm name of the partnership shall be West Tenino Lumber Company.

Article II. Business of Partnership:

The partnership shall be for the general purpose and object of carrying on a lumber business and for the purpose of owning, renting and leasing or operating properties of the partnership. In order to carry out the purposes of the partnership, the partnership shall have the right to buy, lease, transfer or otherwise dispose of real property and to buy and sell supplies and all things necessary for the conduct of its business. The partnership may also subscribe and own, buy and sell the capital stock of any corporation and hypothecate the same; buy bonds and other securities of every type and character; borrow and loan money and charge interest therefor; and secure the payment of any debt or liability of the partnership by its bills, promissory notes, bonds, mortgages or deeds of trust, and do all acts and things necessary and convenient for the accomplishment of the objects and purposes hereinbefore set forth.

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

Article III. Principal Place of Business:

The principal place of business of the partnership shall be Tenino, Washington, or such other place or places as shall be from time to time mutually agreed upon between the partners.

Article IV. Term of Partnership:

(a) The partnership shall begin on the 30th day of December, 1952, and shall continue for a period of five (5) years.

(b) Upon mutual agreement of the partners the term of the partnership may be extended for such additional period of time as the parties may agree upon; provided that an agreement for such an extension is arrived at within sixty (60) days preceding the end of the initial five year term. If no agreement is reached within sixty (60) days prior to the termination of the initial term, then the partnership shall terminate at the end of the initial five (5) year term and shall be wound up under the provisions of the Uniform Partnership Act of the State of Washington.

Article V. Capital of Partnership:

The capital of the partnership shall consist of the assets received upon the liquidation of West Tenino Lumber Company, a Washington corporation, specifically including that certain lease originally entered into between Northern Pacific Railway Company and

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

U. S. Herrington, assigned to Thurston County Investment Company, and subsequently assigned to West Tenino Lumber Company, together with all appurtenances thereon, subject to existing liabilities, which capital shall be owned in the following proportions:

H. E. Kerry.....	45/88ths
Israel Torrico	23/88ths
Charles L. Stickney.....	17/88ths
H. A. Preszler.....	3/88ths

Additional capital contributions may be made from time to time by any or all partners as the partners shall hereafter mutually agree.

It is expressly understood that the partnership interest shall not include any loans made by any partner to the partnership, but that any such loan or loans shall be a current liability of the partnership.

Article VI. Share of Gains, Losses and Profits:

The parties hereto are to share in the net income, net losses and capital gains and losses of the partnership as follows:

H. E. Kerry.....	45/88ths
Israel Torrico.....	23/88ths
Charles L. Stickney.....	17/88ths
H. A. Preszler.....	3/88ths

At any time that the partnership shall conduct an

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

active business operation salaries shall be paid to such partners who are active in the business in relation to the reasonable value of their respective services.

Article VII. Withdrawals:

The books of the partnership are to be closed only at the end of each fiscal year or at the prior termination of the partnership and the undrawn fiscal year profits are to be credited to the profit accounts of each partner. The books of accounting are to be kept by an accountant appointed by the partnership and the records shall be open to the inspection and examination of each of the partners.

Withdrawals of profits are to be made by the partners at such time and in such time and in such amount as shall be agreed upon from time to time.

A salary paid to any partner is not to be considered a withdrawal of profits.

Article VIII. Managing Partner:

(a) It is understood and agreed that H. E. Kerry shall be the managing partner and shall be responsible for the general management of the business with the right to delegate such duties as he may see fit to any other partner or employee of the partnership.

(b) No partner shall borrow money for the part-

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

nership, but all such borrowings shall be with the unanimous consent of all partners.

(c) No partner shall have the right to loan money or any assets of the partnership to third parties or to any partner without the unanimous consent of all partners.

Article IX. Death of a Partner:

(a) In the event of the death of any partner during the term of the partnership, the partnership shall immediately terminate and the business of the partner shall be transferred to a corporation. The estate of the deceased partner shall accept the proportionate share of the capital stock of the corporation in complete settlement of his capital account in the partnership. The corporation shall be organized under the laws of the State of Washington, for the purpose of engaging in the business conducted by the partnership. The Corporation shall be organized so as to have five (5) members on its board of directors. Upon the organization of the corporation and the transfer to it of all the assets of the partnership, subject to all of its liabilities, all of the common stock of the corporation shall be distributed to the partners, including the estate of the deceased partner in the proportion in which the capital of the partnership is owned by the partners as of the date of such transfer.

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

(b) In the alternative, however, if the surviving partners elect to do so by giving notice of their intention within ten (10) days after the death of any partner, they shall have the right to purchase the interest of the deceased partner in and to the partnership assets at the book value as of the date of death in lieu of being obliged to join in the forming of a corporation to take over the partnership assets. Payment of the interest of the deceased partner must be completed within sixty (60) days after death of the deceased partner. In the event that the parties are unable to agree upon book value, then the same shall be determined by arbitration as provided by the Uniform Arbitration Act of the State of Washington.

Article X. Amendments:

If at any time during the continuance of this partnership the partners shall deem it necessary and expedient to make any alterations in any paragraph, clause, matter or thing herein contained, for the more advantageous or satisfactory operation of the partnership business, it shall be lawful for them so to do by any writing under their joint hands endorsed on this agreement, or entered in any of the partnership books; and all such alterations shall be adhered to and have the same effect as if the same had been originally embodied in and formed a part of this agreement.

In Witness Whereof, the parties hereto have set

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)
their hands and seals the day and year first above
written.

/s/ H. E. KERRY,

/s/ CHARLES L. STICKNEY,

/s/ ISRAEL TORRICO,

/s/ H. A. PRESZLER.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 7

514272

Vol. 270 Page 351

Bill of Sale and Transfer of Assets

Know All Men by These Presents:

That H. E. Kerry, Trustee in Liquidation of West Tenino Lumber Company, a Washington corporation, for and in consideration of the sum of Ten Dollars (\$10), hereby sells and transfers to the undersigned the following described property of West Tenino Lumber Company, to wit: To H. E. Kerry, 45/88ths; to Israel Torrico, 23/88ths; to Charles L. Stickney, 17/88ths, and to H. A. Preszler, 3/88ths, of all of the assets of said company of every kind and nature, specifically including but not limited to all right, title and interest in and to that

(Testimony of Harold Edwin Kerry.)

certain lease originally between Northern Pacific Railway Company and U. S. Herrington, assigned to Thurston County Investment Company and subsequently assigned to West Tenino Lumber Company, together with all extentions thereto, which lease specifically covers the following property:

That portion of the Railway Company's Point Defiance Line right of way in Block 53 of Snyder & Stevens Plat of Tenino, as recorded in said county; in Seventh Street, vacated by Ordinance No. 50 of the Town of Tenino, and in unplatted portions of Samuel Davenport Donation Land Claim No. 37, in section 30, in township 16 north, of range 1 west of the Willamette Meridian lying between a line parallel with and distant 50 feet easterly, measured at right angles, from the center line of the most easterly main track of said Point Defiance Line as now constructed and a line parallel with and distant 185 feet northwesterly, measured at right angles, from the center line of the main track of the Railway company's Prairie Line as now constructed and between two lines drawn at right angles to said Prairie Line track center line from points therein distant respectively 200 feet and 560 feet northeasterly, measured along said Prairie Line track center line, from Mile Post 40,

Subject to all existing liabilities, which transfer

(Testimony of Harold Edwin Kerry.)

shall be effective as of the close of business on December 30th, 1952.

/s/ H. E. KERRY,
Liquidating Trustee.

State of Washington,
County of King—ss.

I, the undersigned, Notary Public in and for the State of Washington, do hereby certify that on this 30th day of December, 1952, personally appeared before me H. E. Kerry, to me known to be the individual described in and who executed the within instrument and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

Given under my hand and Official Seal this 30th day of December, 1952.

[Seal] G. M. BENNETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

File No. 514272

Filed for Record Dec. 30, 1952, at 1:33 p.m.

C. L. STICKNEY.

(Testimony of Harold Edwin Kerry.)

State of Washington,
County of Thurston—ss.

I, Ellis C. Ayer, County Auditor of Thurston County, State of Washington, do hereby certify that the foregoing is a true and correct copy of "Bill of Sale and Transfer of Assets." File No. 514272 as recorded in Vol. 270 of Deeds at Page 351.

In Witness Whereof, I have hereunto set my hand and official seal this 15th day of March, A.D. 1954.

[Seal] ELLIS C. AYER,
County Auditor.

By /s/ M. CAMPBELL,
Deputy.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 8

Certificate of Firm Name

Know All Men by These Presents, That the undersigned H. E. Kerry, Charles L. Stickney, Israel Torrico and H. A. Preszler, doing business at Tenino in the County of Thurston and State of Washington under an assumed name and style, do hereby certify that the designation, name and style in which said business is to be conducted is West Tenino Lumber Company; that the following named persons are all of the persons conducting or intend-

(Testimony of Harold Edwin Kerry.)

ing to conduct said business or having an interest therein, and their true and real names, together with their respective post office addresses, are as follows, to wit:

H. E. KERRY

Post Office Address.....

CHARLES L. STICKNEY

Post Office Address.....

ISRAEL TORRICO

Post Office Address.....

H. A. PRESZLER

Post Office Address.....

In Witness Whereof, we have hereunto set our hands this 30th day of December, A.D. 1952.

/s/ H. E. KERRY,

/s/ CHARLES STICKNEY,

/s/ ISRAEL TORRICO,

/s/ H. A. PRESZLER.

State of Washington,
County of King—ss.

I, the undersigned, Notary Public in and for the State of Washington, residing at,

(Testimony of Harold Edwin Kerry.)

do hereby certify that on this day of
....., 195..., personally appeared before
me H. E. Kerry, Charles L. Stickney, Israel Torrico
and H. A. Preszler, residing at the addresses above
stated, to me known to be the individuals described
in and who executed the within instrument and
acknowledged that they signed and sealed the same
as their free and voluntary act and deed for the
uses and purposes herein mentioned.

Given Under My Hand and Official Seal this 30th
day of December, 1952.

[Seal] /s/ G. M. BENNETT,
Notary Public in and for the State of Washington,
Residing at Olympia.

Filed: Dec. 31, 10:37 a.m. '52.

Recorded: Vol. 1, Page 430.

State of Washington,
County of Thurston—ss.

I, Norma Muir, Dep. County Clerk and Ex Officio
Clerk of the Superior Court of the State of Wash-
ington, for Thurston County holding session at
Olympia, do hereby certify that the foregoing is a
true and correct copy of the original as the same
appears on file and of record in my office. In Wit-
ness Whereof, I have hereunto set my hand and

(Testimony of Harold Edwin Kerry.)

affixed the seal of said Court this 12th day of March, 1954.

[Seal] /s/ NORMA MUIR,
Deputy County Clerk Thurston County, State of
Washington.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 9

Assignment

H. E. Kerry does hereby assign and set over to Ruth B. Kerry, all of his right, title and interest in and to the partnership known as West Tenino Lumber Company, which is a partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico. Said assignment is substituted security for that certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28, 1952, and which security is to act as continuing security for that certain note dated July 28, 1952, until said note is paid in full.

Dated this 30th day of December, 1952.

/s/ H. E. KERRY.

[Endorsed]: Filed March 25, 1954.

(Testimony of Harold Edwin Kerry.)

Q. Now Mr. Kerry, your promissory note to Mrs. Kerry of July 28th, 1952, the one that's referred to as Exhibit number 2 for \$29,250; calling your attention to that [21] instrument, has any sum been paid by you on that instrument to Mrs. Kerry?

A. No. Nothing has been paid.

Q. Has any sum been paid by anyone to Mrs. Kerry or anyone else on that instrument?

A. No, it hasn't.

Q. So is it your testimony that the entire sum for which that note was given is still unpaid?

A. Yes.

Q. Now Mr. Kerry, as of the date that you filed your voluntary petition in this cause was the partnership which has been referred to still in existence?

A. Yes, it was.

Q. And I believe your petition was filed in this cause on October 2—October 2nd, 1953—

A. Yes.

Q. And the partnership was still a going concern, is that right?

A. Yes, it was.

Q. The West Tenino Lumber Company partnership.

Have the assets been sold yet? Has the winding up and liquidation of the partnership been completed since your bankruptcy?

A. No, it hasn't.

Q. Are any steps or negotiations in progress looking [22] towards that winding up?

A. The negotiations are in progress for the sale of the—of the mill.

(Testimony of Harold Edwin Kerry.)

Q. Yes.

There are three other partners who are not in any bankruptcy proceedings, I trust?

A. That's right.

Q. Now Mr. Kerry, are you——

The Referee: Pardon me.

You say the mill, it has not been sold?

The Witness: No, it hasn't been.

The Referee: Mr. Stickney called me about a week ago and said they were selling it that day.

Mr. Grunke: Well, it's like the sale of most mills. A sale today sometimes takes 6 months or 2 months.

Q. Now Mr. Kerry, are you personally familiar with the mill and its assets——

A. Yes, I am.

Q. And its equipment?

Have you operated the mill?

A. Yes, I've operated it for the last year and a half.

Q. Are you familiar with lumber mill and resaw mill values? A. Yes.

Q. What type of a mill is this West Tenino mill? [23]

A. This is a remilling plant consisting of a resaw, and a planer, and a dry kiln and the other equipment, necessary equipment that goes with it.

Q. It doesn't take logs and manufacture them into lumber; it's a remilling you say?

A. Remilling. It buys lumber and resaws it and finishes it.

(Testimony of Harold Edwin Kerry.)

Q. Now Mr. Kerry, are you familiar with values of mills? A. Fairly well.

Q. What has been your connection with the lumber and milling business, generally?

A. I've been in the lumber business practically all of my life, since nineteen—my business life since 1921.

Q. Can you tell us what the value of your partnership interest in this West Tenino—well, maybe I should ask you what the value, the net value of the mill itself is?

A. Well if you're referring to book value for one thing——

Q. Well why don't you give us the book value as of the present time?

A. Well, the net book value of the—of the mill on today's figures according to the account is \$46,519.29.

Q. And what—and since your ownership is 51 and some fraction per cent, what is the value then of your interest in that figure?

A. It's \$23,785. [24]

Q. And what is the——

The Referee: Wait a minute. Pardon me. Go ahead, please.

The Witness: Twenty-three thousand seven eighty-five.

Q. And what do you mean by "book value"?

A. Well, it's the cost less the depreciation, then the receivables and liabilities taken out as well.

(Testimony of Harold Edwin Kerry.)

Q. Are the figures you have just given based on market value then or something else?

A. No. Those are merely book values. The market value is based upon the offer that has been made of \$50,000, which would be considered the market value, and that's the best offer that's been made. The only offers that have been made are two of them, \$50,000. It brings the net worth of the mill on a market value basis of \$42,865.83.

Q. And on that basis what would be the value of your partnership interest?

A. My partnership interest in that case would be \$21,917.

Q. And Mr. Kerry, how do you—are you familiar at all with the books and records of the partnership to obtain book values and the likes of that?

A. Only insofar as the statements are made up, and I look at them. [25]

Q. In other words, you get the statement regularly as a partner? A. Yes.

Q. And those figures you have given are based on that? A. On the accountant's figures.

Q. That's the book value figures? A. Yes.

Q. Now, on the market value figures you stated that you based that on the fact there had been an offer or two offers for purchase at \$50,000. Is that the purchase of what?

A. That's the purchase of the mill assets.

Q. And have there been any higher offers?

A. There have been no other offers.

(Testimony of Harold Edwin Kerry.)

Q. Has there been an attempt to find buyers for the mill? A. I think so.

Q. Well, you know, don't you, whether there have or not?

A. Well, I think some of the other partners have tried to find other buyers for the mill.

Q. Are you aware of whether or not there might be other possible buyers than those two offers you referred to?

A. There are none that I know of at all.

Q. Do you think it is possible to get a higher price for the mill than the \$50,000 referred to?

A. No, I don't. [26]

Q. In other words, you think that's a reasonable market value, do you?

A. Yes, that's a good price.

Q. A good price.

Mr. Kerry, in the first pledge agreement, the July pledge agreement to Mrs. Kerry that you referred to, July, '52, you mentioned a pledge of West Tenino stock and Olympic Stud Mill stock. And now in the pledge agreement in December of '52 was the Stud Mill stock again pledged or was that left out of the second one?

A. That was left out of the second pledge.

Q. So that the pledge in December of '52 covered only—— A. The West Tenino——

Q. ——partnership——

A. ——partnership interest.

Q. I see.

But the Stud Mill pledge was given up at that

(Testimony of Harold Edwin Kerry.)

time, is that right? A. Yes.

Mr. Grunke: I have no further questions of Mr. Kerry. [27]

Cross-Examination

By Mr. Krause:

Q. Mr. Kerry, on October 2nd, 1952, you signed a schedule setting forth a summary of your debts and assets listing your debts at \$138,148.07 and your assets at \$13,665.89. Now, that was your true financial condition at that time, was it?

A. Well, I'll have to look at that statement to see what that is. Was that filed in the bankruptcy court, the federal file?

Q. Yes, this—all of the schedules that you filed in the bankruptcy court including the amended schedule that you filed somewhat later reflect the true—reflect your true position on October 2nd, 1952?

A. There were a great many conditional liabilities in there—contingent liabilities in there which might or might not—it was just a fair possibility that some of them might be liabilities and they were put in for that reason. Some of them claimed it, but I'm not at all sure that they were liabilities.

Q. You were insolvent on the date that you filed the petition?

A. I don't—on the day I filed the petition?

Q. Yes. And the day you signed the petition. [28]

A. (No response—pause.)

The Referee: Will you answer the——

The Witness: Yes, I was.

(Testimony of Harold Edwin Kerry.)

Q. Now, handing you Plaintiff's Exhibit number —Petitioner's Exhibit Number 1, which is a promissory note, dated the 15th day of August, 1950, wherein Seattle First National Bank as executor of the payee; I note on the back that it shows payments of \$1,000.00 on the 26th day of April, 1951, six thousand five hundred on the 16th day of May, 1951, and two thousand five hundred on the 28th day of September, 1951, and five thousand on the 5th day of May, 1952, making a total of \$15,000.00. And you say that the true balance on this note at the time it was paid was \$29,250.00. Now, it reads twenty-nine thousand two hundred and fifty——

A. \$29,250.00 is the figure that the bank agreed to take for a settlement of the indebtedness.

Q. Well, was the indebtedness greater at that time?

A. According to this note it was greater, yes.

Q. Well, was it actually greater?

A. I feel quite sure that the note was for the indebtedness if I understand the terms.

Q. The principal balance on the note was \$60,000.00 and they settled for approximately half?

A. That's correct. [29]

Q. You did owe the full \$60,000.00 then; there was nothing else involved?

A. No, nothing else involved.

Q. I'll hand you Petitioner's Exhibit number 9 which purports to be an assignment of your interest in the partnership in the West Tenino Lumber Company to Ruth B. Kerry, that the statement

(Testimony of Harold Edwin Kerry.)

says that: "The assignment has substituted security for a certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28th, 1952, in which security was to act as a continuing security for that certain note dated July 28th, 1952, until such note is paid for."

I ask you if this assignment was ever recorded or if there's an affidavit with this state in connection with it?

A. I don't think I can answer that question. This was made up by Bogle, Bogle & Gates and just what was done with this, I'm not too sure.

Q. You have no files recorded or—as far as you know that's the complete instrument?

A. As far as I know it's complete.

Mr. Grunke: It is. That's the complete instrument. It's not a recorded document or file copy.

Q. And this so-called assignment was merely given for the purpose of securing the balance due—purportedly due [30] Ruth B. Kerry at that time?

A. Yes.

Q. It was the security of——

A. For securing that ninety—\$29,250.00.

Q. I see.

Now, I note that you were referring to Petitioner's Exhibit number 2 which is the promissory note in the amount of \$29,250.00 payable to Ruth B. Kerry. You received that amount from Ruth B. Kerry at that time?

A. No, the bank received that amount——

Q. The bank received that amount?

(Testimony of Harold Edwin Kerry.)

A. —in payment of the—in payment of my—

Q. How did Ruth B. Kerry pay that amount, or do you know?

A. On a cashier's check made out to the bank.

Q. And where did the money come from for which to pay the cashier's check?

A. It came from her own money that she had before we were married.

Q. Now, I'm asking you where it came from, not how much money it was.

A. It came from securities which she sold at that time.

Q. From securities that were sold at that time?

A. Yes.

Q. And what securities were they? [31]

A. I don't recall just which ones they were.

Q. Were they sold through a broker?

A. I think they were sold to Frederick, Morford and—Security Company in the 1411 Building in Seattle.

Q. Do you know of any receipt—was there a receipt from the broker at the time these securities were sold, to substantiate your testimony that such securities actually were transferred?

A. I think there was such a—they always send out such a statement.

Q. And do you have that statement?

A. I don't have it here. I don't know whether Mrs. Kerry has it at home or not. It can be easily verified.

(Testimony of Harold Edwin Kerry.)

Mrs. Kerry: I can get them.

Q. When were these security—securities purchased, if you know?

A. Mrs. Kerry could tell you better than I can on that if she has the record with her.

Q. In whose name were the securities?

A. Mrs. Kerry.

Q. In the name of Ruth B. Kerry?

A. If she had them—did you have the name changed over to Ruth B. Kerry—

Q. (Interrupting): Well, do you know?

A. No, I don't know. [32]

Q. You don't know anything about that.

Do you know if any of this \$29,250.00 which was paid for the cashier's check ever went through any bank account, either of yours or Mrs. Kerry?

A. It didn't go through mine. I don't know whether she put it through the bank account. I believe the cashier's check was made up by the People's National Bank in Seattle, if I remember correctly.

Mr. Grunke: We'll have further evidence on that, counsel.

A. That's where her account was.

Q. Handing you Petitioner's Exhibit number 6, which purports to be a partnership agreement, I'll ask you if Ruth B. Kerry is a partner to this partnership agreement or at any time ever did become a party to the partnership?

A. No, she didn't.

(Testimony of Harold Edwin Kerry.)

Q. I'm handing you Petitioner's Exhibit number 7, which is a bill-of-sale transferring the property formerly owned by the West Tenino Lumber Company, a Washington corporation, to certain individuals. All of this property was transferred to you, H. E. Kerry, Israel Torrico, Charles L. Stickney and H. A. Preszler. Did Mrs. Kerry's name ever appear in any of the transferring of any of this property? [33]

A. No, I don't think so.

Q. Handing you Petitioner's Exhibit number 8, which purports to be a certificate of firm name; that's the certificate that was filed in the clerk's office in Thurston County, is it?

A. Yes.

Q. I note that this states that: "H. E. Kerry, Charles L. Stickney, Israel Torrico, and H. A. Preszler, doing business in Tenino in the County of Thurston and State of Washington under an assumed name which styles are hereby certified that the designation, name and style under which said business is to be conducted is the West Tenino Lumber Company; that the following-named persons are all the persons conducting or intending to conduct said business or having an interest therein. And their true and real names, together with their respective post offices, are as follows:" And then it sets forth the names of the several different parties to the certificate.

Of your knowledge, has there been any kind of a certificate filed for Ruth B. Kerry showing that she has an interest in this West Tenino Lumber Company?

(Testimony of Harold Edwin Kerry.)

A. No, I don't think so. She had no interest in the—in the West Tenino Lumber Company as such as I understand the transaction. She was the pledgee of my interest. [34]

Q. She was a pledgee of your interest?

A. Yes.

Q. Then Mrs. Ruth B. Kerry never had anything to do with the partnership aside as shown in these different instruments in the several exhibits which have been admitted?

A. No, she was never a partner.

Q. She was never a partner? A. No.

Q. Nor did she ever have possession of any of the assets? A. No.

Q. Did she ever exercise any control or manage the partnership in any manner whatsoever?

A. No.

Q. What was delivered to her in the way of a pledge? What property was ever delivered to her in the way of a pledge?

Mr. Grunke: If the Court please, I think we're getting into some questions here that are really legal questions and intend to be legally argumentative. I think the documents speak for themselves. You can ask what documents were delivered or what assets were delivered. I don't think that we should get these long questions that tie in so many legal conclusions with them. These facts pretty well speak for themselves. [35] It will be a matter of legal argument when we get through.

The Referee: I will sustain your objection with

(Testimony of Harold Edwin Kerry.)

one qualification, that is you just want to show that she took no active interest and had nothing to do with the partnership.

Mr. Krause: That's right.

Mr. Grunke: We grant that.

Mr. Krause: You can state that.

Mr. Grunke: That she did not take action. Mrs. Kerry did not take an active interest in the management of partnership affairs, and did not have physical possession of partnership assets.

Mr. Krause: And no assets were ever delivered to her.

Mr. Grunke: No. No partnership assets were delivered to her.

Q. Mr. Kerry, you were the manager of this partnership? The West Tenino Lumber Company?

A. Yes, I should say that that would be correct.

Q. And as manager of the West Tenino Lumber Company all of the assets of the company were in your possession?

A. Well, I can't answer that question whether I would have possession of the assets or not.

Mr. Grunke: I think that again, your [36] Honor, is a legal question.

The Referee: Objection will be sustained.

Q. Well, what would you do in connection with the partnership? A. The partnership affairs?

Q. Yes.

A. Under our partnership agreement I would have the controlling, say, of it just as we did in the corporation.

(Testimony of Harold Edwin Kerry.)

Q. You were the manager.

What were the assets of the partnership?

A. The assets of the partnership were the mill at Tenino.

Q. And did you own the real property?

A. No.

Q. Whom did own the real property?

A. The Northern Pacific Railroad Company from whom we leased.

Q. From whom you leased? A. Yes.

Q. The partnership and you as one of the members of the partnership, owned the lease?

A. Owned the lease and the physical assets of the mill.

Q. As a lessee? A. Yes.

Mr. Grunke: As a partner. Go ahead.

A. The property as a lessee. That's the real estate, I [37] mean, as a lessee.

Q. Now, did you own any other assets?

A. No, none that I know of.

Q. Well, weren't there any physical properties aside from the lease that was owned by the partnership?

A. Well, yes, physical assets at the mill, yes.

Q. And what were those physical assets?

A. They were numerous; consisting principally of a resaw and necessary sorting chains, a planer, dry kiln, Bellows carrier and a fork lift, office building, dry planing shed, dry shed and planing shed combined. That's the principal assets.

(Testimony of Harold Edwin Kerry.)

Q. Did this West Tenino Lumber Company actually operate the mill?

A. No. The West Tenino Lumber Company leased the mill.

Q. Was that continuously from December 30th of 1952 until you filed your petition in bankruptcy?

A. Yes, that was continuous from the time we purchased the mill until the present time, in fact.

Q. In other words, if I understand this correctly, the West Tenino Lumber Company was the lessee of the real property from the Northern Pacific Railway and that the Tenino Milling Company was the lessee from the West Tenino Company as to the principal property and including both the real and personal property? [38]

A. Yes, the West Tenino Lumber Company as the owner of the mill and as the lessee of the real property leased the mill to the Globe Milling Company at one time which consisted of two of the partners and then later leased it to one of the partners under the name of the Tenino Milling Company.

Q. Were these leases executed prior to December 30th, 1952, or after?

A. These leases were executed prior to December 30th, 1952.

Q. But the Tenino Milling Company was the only lessee as far as the West Tenino partnership was concerned?

A. Well, it was at that time, but prior to that it had leased it to the Globe Milling Company. There

(Testimony of Harold Edwin Kerry.)

were two different periods in there, two different leases.

Q. But the lease to the Globe Milling Company had terminated before this partnership was formed? A. Yes.

Q. Did you have insurance upon the property—— A. Yes.

Q. ——of the West Tenino Lumber Company?

Do you know if the name of Ruth B. Kerry appears as having any insurable interest in that insurance? A. No, I don't think it did.

Q. It did not. [39]

The income of the West Tenino Lumber Company was the rents received from the Tenino Milling Company? A. Yes.

Q. And what happened to these rents?

A. These rents were paid out in various expenses and distributed.

Q. Distributed to whom?

A. Distributed to—I'm not sure whether it's any definite—actual distribution to any of the partners or not, but it's practically all paid out in paying off obligations of the West Tenino Lumber Company.

Q. And you as manager had control of who was paid and so on? A. Yes, we all agreed on that.

Q. By "all," you mean the——

A. All the four partners.

Q. All four of the four partners and not referring to Mrs. Kerry? A. No.

Q. Did you say that you were generally familiar

(Testimony of Harold Edwin Kerry.)

with the financial condition of the partnership at all times? A. Yes.

Q. Was there a surplus in this partnership at all times?

A. Well, I don't think so if you would consider the liabilities there, there probably was not. You'd have [40] to refer to the books to determine that. I don't actually recall at the time. I don't have them here now.

Mr. Grunke: I believe, Mr. Krause, I might interject. Ask him about surplus. Are you referring just to net earnings or total assets over liabilities?

Q. I was going to. Did your net assets at all times exceed your liabilities?

A. Not at all times. No, because we were paying off certain obligations there that came with the——

Q. I'm not referring to your income. I'm referring to your total assets.

A. Oh, yes, the assets would exceed the liabilities.

Mr. Krause: That's all.

The Referee: Just one question.

The assets of the business at the present time, you say, could be sold for some—your interest, \$21,917.00, that's the value of it. Are there any liabilities or is that the net involved in there?

The Witness: This is the net.

The Referee: This thing boils down after all the bills are paid you would receive that. I mean, your interest would receive that out of the sale if it's sold? [41]

(Testimony of Harold Edwin Kerry.)

The Witness: Yes, that's correct.

Mr. Grunke: I have no further questions of this witness.

The Referee: You may be excused.

(Witness excused.)

Mr. Grunke: Mrs. Kerry, please.

The Referee: Well, at this time we'll take a 5-minute recess.

(Recess.) [42]

The Referee: The court will again be resumed.

RUTH B. KERRY

called as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grunke:

Q. What is your name, please?

A. Ruth B. Kerry.

Q. And that's spelled K-e- double r-y?

A. That's right.

Q. You're the wife of Harold E. Kerry?

A. I am.

Q. He's the person who just testified here?

A. Yes.

Q. And how long have you and Mr. Kerry been married? A. It was '48.

Q. 1948? A. That's right. June.

Q. And, Mrs. Kerry, prior to that were you living in the State of Washington?

(Testimony of Ruth B. Kerry.)

A. No, I was not. [43]

Q. Where was your home prior to June, 1948?

A. Ohlman, Illinois.

Q. And you moved out here after you were married, then, is that right? A. That's right.

Q. And you've been living here ever since?

A. Right.

Q. Mrs. Kerry, calling your attention to the summer of 1952, July, 1952, do you recall some transactions regarding stock of Mr. Kerry, that you had? A. Yes, I do.

Q. Just in your own words, in a general way, will you tell us what transpired, what occurred?

A. Well, Mr. Ransom called up and said he wanted to call the—or wanted to get rid of the shares that was pledged to him at the bank. And Mr. Kerry didn't have the funds at the time and I said, "Well, I'll sell some of my stock and securities and get it out for you."

Q. The Mr. Ransom you refer to is whom?

A. He's at the First National Bank in Seattle, the Trust Company. The Trust Department.

Q. Following that, what did happen? Did you——

A. Well, I went down to the bank and I drew out part of—got my securities out of the box and took it over to Badgley, Frederick, Morford & Rogers, I think the name [44] of the place is. And Mr. Badgley took care of it and sold the securities. That's how I got the money for it.

Q. And what were done with the funds from the

(Testimony of Ruth B. Kerry.)

sale of the securities? Did he give you a check or did you deposit them in some account, or what happened?

A. In the Peoples National Bank. I had it deposited there and drew a check—wrote a check out to the First National Bank for the——

Q. Mrs. Kerry, showing you what has been marked for identification as Petitioner's identification number 10, can you tell us what that check relates to?

A. It relates to the amount that had to be paid to the First National Bank.

Q. I see. And that check is drawn by you, is it?

A. Right.

Q. On what bank now is it drawn?

A. You mean what bank it was? It was the securities.

Q. Yes, and on what bank?

A. Peoples National Bank.

Q. And it's made payable to whom?

A. Made payable to the Peoples National Bank of——

Q. Washington? A. ——Washington.

Q. And what did they give you for that check that you made [45] payable to them?

A. A cashier's check.

Q. They gave you a cashier's check.

To whom was the cashier's check payable?

A. To the First National Bank.

Q. And do you have that cashier's check, or was that delivered to the bank in Seattle?

(Testimony of Ruth B. Kerry.)

A. That was delivered to the Seattle Bank.

Q. And it did not come back to you, did it? The cashier's check—this check came back to you but the cashier's check drawn, of course, did not, did it?

A. No.

Q. And you do not have that cashier's check—

A. No.

Q. —or cancelled checks here today.

The securities that you refer to that were sold to raise that \$29,250.00, what—where did you get those securities?

A. Why, from my former husband after he'd passed on. It was left to me.

Q. And approximately when did you, as a result of acquiring them from your former husband's estate, obtain the securities? I mean, when did they become yours? A. Well, they—

Q. When was the estate probated, approximately what year? [46]

A. It may have been some stock I bought after I got out here, because after I sold my house back there I—I had some—well, I bought some securities in—

Q. In other words, the—

A. —'38. That's the year that Mr. Watkins died, in May, '38.

Q. So you purchased from property that you inherited from your prior husband. You either got those securities or purchased some from time to time, is that right? A. That's right.

Q. Were any of those securities purchased from monies that you earned by working after your mar-

(Testimony of Ruth B. Kerry.)

riage to Mr. Kerry? A. No, sir.

Q. Have you had any employment since your marriage to Mr. Kerry? A. No.

Q. Were any of these securities purchased from any funds which Mr. Kerry may have given you?

A. No.

Q. To what extent, if at all, did you keep your money or your properties from your former marriage separate from these, if you did, can you explain to us?

A. I kept my funds in a separate bank, and I also have received money from a trust account, trust fund.

Q. Where is the trust—— [47]

A. In the St. Louis Union Trust Company in St. Louis, Missouri.

Q. Then when you receive those funds from the trust fund, where do they go? In the family bank account or—— A. No, sir, in my own——

Q. In your own bank?

A. In my own fund—own account.

Q. Has there been any commingling of the funds whatever? A. Never.

Q. Did any portion of the twenty-nine thousand two hundred and fifty come from money furnished directly or indirectly by Mr. Kerry? A. No.

Q. It all came from your own separate funds, is that right? A. That's right.

Q. Now, let's see, and this check is dated July 28th, 1952. Do you know whether that was the day on which you actually picked up the cashier's check or purchased it?

(Testimony of Ruth B. Kerry.)

A. That's the day I picked it up.

Mr. Grunke: We'll offer identification 10 into evidence.

Mr. Krause: No objection.

The Referee: No objection, the Petitioner's identification 10 will be admitted into evidence as exhibit—Petitioner's Exhibit 10. [48]

(Whereupon, the check referred to was marked and admitted into evidence as Petitioner's Exhibit No. 10.)

PETITIONER'S EXHIBIT No. 10

[Check]

Main Office

Peoples National Bank of Washington

No.

19-10

1250

Seattle, Washington, July 28, 1952

Pay to the Order of Peoples National Bank of Washington \$29,250.00.

Twenty-nine thousand two hundred fifty and no/100 Dollars.

/s/ RUTH B. KERRY.

[Initialed]: D.

[Perforated]: 19 PD 10.

7-28-52.

[Endorsed]: Filed March 25, 1954.

(Testimony of Ruth B. Kerry.)

Q. Did you owe any money to Mr. Kerry on July 28, 1952? A. No.

Q. You had not borrowed any from him or for any other reason owed him any money?

A. No, indeed.

Q. Were you holding any money of his in any way, shape or form in July of 1952?

A. Never.

Q. Calling your attention, Mrs. Kerry, to certain documents which Mr. Kerry referred to when he was on the witness stand, and particularly Petitioner's Exhibit number 2, can you tell us—do you recognize [49] that document? A. Yes, I do.

Q. And what is it? A. It's a—a note.

Q. Is it the note Mr. Kerry gave you—

A. That's right.

Q. —for the \$29,250.00?

A. It's a note for twenty-nine thousand two hundred and fifty.

Q. And then in Petitioner's Exhibit 3, do you recognize [49] that document? A. Yes, I do.

Q. And just in a general way, what is that document?

A. It's a pledge for the shares of the West Tenino and the Stud Mill.

Q. And that was—this is the pledge you have been referring to in July of 1952?

A. '52, in payment of the twenty-nine thousand two hundred fifty.

Q. And showing you Petitioner's Exhibit num-

(Testimony of Ruth B. Kerry.)

ber 9, a document entitled "assignment," are you familiar with that document? A. Yes.

Q. And can you tell us what it is?

A. That is the—this is in the partnership.

Q. Is this the assignment of the interest in Mr. Kerry's partnership—

A. For his interest in the West Tenino Lumber Company.

Q. And that was in December what?

A. 30th.

Q. '52? A. '52.

Q. And were you familiar with the transaction whereby you acquired values—that assignment of the values that's in the partnership? [50]

A. Yes, I was.

Q. And calling your attention to Plaintiff's Exhibit—

Mr. Grunke: Let's see, should this number be 4 or 5?

The Referee: That should be 4. Identification 4 should be Exhibit 4.

Mr. Grunke: Yes.

Q. Calling your attention to Plaintiff's Exhibit 4, an agreement dated December 30th, 1952, are you familiar in a general way with that agreement?

A. Yes.

Q. And it relates to the same transaction Exhibit 9— A. Same transaction as the—

Q. Exhibit 9? A. —number 9.

Q. And in a general way, what was the arrange-

(Testimony of Ruth B. Kerry.)

ment in December of 1952 that that agreement relates to?

A. Well, the partnership was—after the corporation had changed to a partnership, why, I was to—Mr. Kerry was to take over the—my interest in the partnership and operate it.

Q. In other words, he was—the corporation had to substitute a proper rate of interest for his corporate stock, isn't that right?

A. That's right. [51]

Q. And was the Olympic Stud Mill stock by that agreement continued under the pledge or was that dropped?

A. The what?

Q. The Olympic Stud Mill stock.

A. No, the Olympic Stud Mill was dropped.

Q. Was the Olympic Stud Mill still in existence at that time, as far as you know, in December of '52, or are you familiar with it?

A. Oh, no.

Q. Now, Mrs. Kerry, has any amount ever been paid to you on the note, which is Exhibit 2?

A. No.

Q. Is the entire amount still unpaid?

A. That's right.

Q. Have you received any funds from anybody other than Mr. Kerry in payment on that note?

A. No, sir.

Q. Is Mr. Kerry indebted to you on other obligations in addition to that one?

A. Yes.

Q. Now, they're not secured though by this pledge, are they?

A. No, not in any way.

Q. And on the note, Exhibit 2, I notice that there

(Testimony of Ruth B. Kerry.)

is written in an interest rate of 5 per cent. Do you know whether that was at the time the note was signed or at [52] some other time?

A. That was at the time the—the note was signed.

Q. Yes, it was there when the note was signed—— A. Yes.

Q. ——and delivered to you? A. Yes.

Mr. Grunke: I should call the Court's attention to an error in our petition. I mentioned 6 per cent in our petition, which is a typographical error.

Q. Mrs. Kerry, was a statement furnished to you by the brokers who sold the securities, do you know? A. Well, it—it was, but——

Q. Did you retain it? A. No, I didn't.

Q. You don't——

A. I'm sure I could get it from Mr. Badgley.

Q. Yes, you think you could get a copy, but you didn't keep a copy, yourself?

A. No. It may be in my books, I don't know, I'm——

Q. Is it your testimony then that you did give consideration in July of 1952 for the pledge to you on that date? A. Yes.

Q. And the consideration was what?

A. Twenty-nine thousand five hundred. [53]

Q. Two fifty?

A. Twenty-nine thousand two hundred and fifty.

Q. And when the document—when the pledge of the partnership interest was executed in December of '52, what, if anything, did you get for that? Or what was the consideration or reason for that?

(Testimony of Ruth B. Kerry.)

A. I didn't give anything for that, I don't think.

Q. You didn't give any further cash at that time? A. No.

Q. You simply relinquished the——

A. Just exchanged.

Q. Yes, you exchanged one security for another?

A. That's right.

Q. And you relinquished, I believe you testified, the Olympic Stud Mill stock—— A. Yes.

Q. ——at that time.

Do you have at the present time any assets or property or money belonging to Mr. Kerry?

A. No, sir.

Mr. Grunke: I have no further questions.

The Referee: You may inquire. [54]

Cross-Examination

By Mr. Krause:

Q. Mrs. Kerry, I believe in the previous hearing you testified that in May of 1952 a certain Cadillac automobile was transferred to you by Mr. Kerry as part payment upon a promissory note. Do you remember that testimony? A. Yes, I do.

Q. Was that in payment of the promissory note that's involved in this—— A. No.

Q. ——proceeding at this time?

A. No, it was not.

Q. That was not—that was another note?

A. That has nothing to do with this.

Q. Mrs. Kerry, do you have an independent

(Testimony of Ruth B. Kerry.)

recollection as to what securities were sold in July, 1952?

A. I haven't—oh, dear, some General Mills and some—do you mean that kind of security?

Q. Do you know what the securities were?

A. I don't know that I understand what you mean.

Q. Do you know what securities you sold?

Mr. Grunke: Do you mean, do you mean what companies her securities are from?

Q. What companies are they from? [55]

A. Well, there's some General Mills and Phillip Morris and——

The Referee: I believe you have stated you would authorize the broker to give you a copy of that sale.

The Witness: I can get it.

Mr. Grunke: Yes, we'll authorize—we'll either obtain it or get her authorization and give it directly to the trustee.

The Witness: I can't remember right off.

Q. Do you have any present recollection as to when this stock was acquired by you? If some of it was acquired subsequent to June, 1948, when you were married to Mr. Kerry? A. Yes, it was.

Q. It was acquired subsequent to June of 1948?

A. That's right.

Q. And the proceeds from this sale were deposited in this bank account in the Peoples National Bank? A. That's right.

Q. And that was a bank account in your name?

(Testimony of Ruth B. Kerry.)

A. That's right.

Q. Was it in your name alone? A. Alone.

Mr. Krause: No further questions. [56]

The Referee: Do you wish the witness any further?

Mr. Krause: No, sir.

The Referee: Do you have any recross?

Mr. Grunke: No further questions.

The Referee: You may be excused. Thank you.

(Witness excused.)

Mr. Grunke: If the Court please, we'll rest on this one.

Mr. Krause: I will call Mr. Stickney. [57]

CHARLES L. STICKNEY

called as a witness on behalf of the Trustee, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. Your name is Charles L. Stickney?

A. Yes, sir.

Q. And you're a certified public accountant?

A. Yes, sir.

Q. Mr. Stickney, did you keep the books and records of the West Tenino Lumber Company subsequent to the formation of the partnership in December of 1952? A. Yes, sir.

Q. I'll ask you if at all times subsequent to the

(Testimony of Charles L. Stickney.)

formation of that partnership there was a surplus?

Did the assets exceed the liabilities?

A. Yes, sir.

Q. It was Mr. Kerry's testimony that at this time his interest in the partnership would be approximately \$21,000.00 book value?

A. That was Mr. Kerry's testimony.

Q. Yes. Whether or not that is exactly right is the interest in the company, interest in the surplus would be—reach several thousand dollars, would it not? [58]

A. It would be several thousand dollars, yes.

Q. Probably exceed \$10,000.00?

A. Yes, sir, it would.

Q. And at all times between December 30th, 1952, and October 2nd, 1953, the time of filing this petition in bankruptcy, did he likewise have his interest in the surplus worth more than \$10,000.00?

A. Yes, sir. As far as our record showed.

Q. Did Mrs. Kerry's name appear in any place on the books and records in the company?

A. No, sir.

Q. Was any instrument ever filed by Mrs. Kerry or anyone in her behalf showing an assignment to her?

A. Not—not with me.

Q. And you were the one that had charge of all of the books and records of the partnership?

A. Yes, sir.

Mr. Krause: That's all.

(Testimony of Charles L. Stickney.)

Cross-Examination

By Mr. Grunke:

Q. Mr. Stickney, did Mr. Kerry's interest—or let's say at the present time, would Mr. Kerry's interest to the best of your recollection in the books and records [59] exceed this \$21,000.00 that he testified to or twenty-two thousand, I forget the exact figure?

A. Well, we have a point in dispute, an offset that I'm claiming against rent that I have still unpaid of \$7,000.00. But other than that offset his testimony is substantially the situation at the present moment. We still have bills to come in possibly.

Q. And the offset you're speaking of would tend to increase or reduce his interest?

A. It would reduce his to the sum of \$7,000.00.

Q. Yes, so that his would drop from some twenty-one or twenty-two thousand to fourteen or fifteen, if your point is sustained?

A. Yes, that's correct.

Mr. Krause: That's my understanding, too.

Q. So that the value of Mr. Kerry's interest does not exceed the sum he testified to. Not greater by any chance than the sum he testified to?

A. No, sir.

Mr. Krause: That's the book value?

The Witness: That's the book value.

Q. And as of October 2nd, 1952, was there any substantial difference in the book value of the assets?

A. Not very much.

(Testimony of Charles L. Stickney.)

Q. Between then and now? [60]

A. Not but—not but very little.

Q. In fact, as a matter it may be a thousand dollars or two or——

A. Well, the rent accrues at—the rent accrued at the rate of fifteen hundred a month and we had insurance, depreciation and other charges against it.

Q. Well, if anything, the book value was probably less in October because rent has accrued since that time.

A. Yes, sir, there has been some book profit since then.

Q. Sure. So that in October the value would be then even less than it is as of today?

A. Yes, sir.

Mr. Grunke: I have no further questions.

The Referee: Was there any knowledge or record of any instruments of any kind conveyed to the officers of the corporation that this stock had been pledged to Mrs. Kerry?

The Witness: I had informal knowledge that Mr. Kerry had told me that he had pledged his stock. When he first pledged it I didn't know who it was pledged to. Later on he told me to his wife.

Q. And you were active in the corporation, also, were you not?

A. Yes, sir. The four of us have been active right straight through. [61]

Mr. Grunke: I have no further questions.

(Testimony of Charles L. Stickney.)

Redirect Examination

By Mr. Krause:

Q. Was that information filed with any of the records of the corporation?

A. As to this assignment?

Q. Yes. A. No.

Q. You just had personal knowledge of it, not as an officer of the company?

A. Well, I don't know in what capacity you call it personal knowledge. Mr. Kerry told me.

Mr. Grunke: That's a conclusion anyway. You don't know which hat you had on that day?

The Witness: No, I don't.

Mr. Grunke: Very well.

The Referee: Was that true also of the partnership?

The Witness: He discussed the matter before the dissolution and he was assured by Bogle, Bogle & Gates that Mrs. Kerry would be protected in her security. That was my understanding——

The Referee: In other words, all the [62] partners knew that this stock was pledged to Mrs. Kerry?

The Witness: Yes, we knew it. Later the partnership interest.

Mr. Grunke: No questions.

Q. Did you have that knowledge on December 30th, 1952, or was it later?

A. I couldn't tell the exact date that he told me. It was after the corporation was informed and I

(Testimony of Charles L. Stickney.)

think—if I recollect correctly before the corporation was dissolved. I am not certain.

Q. But you knew that the corporate stock was pledged before——

A. I knew it was pledged but I didn't know who to until, as I said, Mr. Kerry told me later.

Q. And was that the extent of your knowledge that you just knew that the corporate stock was pledged?

A. Yes, I knew that the partnership interest that was substituted for the stock was pledged.

Mr. Krause: That's all.

Mr. Grunke: No questions.

(Witness excused.)

Mr. Krause: Call Mr. Schneider. [63]

JOSEPH R. SCHNEIDER

called as a witness on behalf of the Trustee, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. Your name is Joseph Schneider?

A. Joseph R. Schneider, S-c-h-n-e-i-d-e-r.

Q. And you are the trustee in this proceeding?

A. Yes.

Q. And as trustee do you have the—have the books and records of Mr. Kerry been turned over to you?

A. Of the H. E. Kerry Company, yes.

Q. I see.

(Testimony of Joseph R. Schneider.)

A. And the personal records that he's given me, his personal bank accounts and so on.

Q. And have you made an examination of all of those records? A. Yes, I have.

Q. And from that examination were you able to determine whether or not Mr. Kerry was solvent on the 28th day of July, 1952?

A. Not exactly on as of that date. I have used as for a basis of making the determination a statement which he submitted to the Seattle First National Bank on August the 31st, 1952. The reason for that is this: That [64] prior to the time—well, from the time that Mr. Kerry's partner, John X. Johnson, died and he had to assume these obligations, there were some ninety thousand dollars of obligations in a Canadian arrangement that had to be taken care of and there was also the \$75,000.00 that was to be paid to Mr. John X. Johnson's estate for his partnership equity.

His affairs were quite heavily involved and he showed an operating deficit in April and March along in '52 there and all the way through pretty much. That was occasioned by the fact that there had been substantial losses at Lake Stevens Mill and the mill had burned. It had been sold and there were money funds due from the insurance company there. Mr. Kerry was the liquidating trustee and had assumed all the responsibilities.

The Canama Lumber Company had failed in Canada with substantial losses to Mr. Kerry of approximately \$85,000.00 and the—he had become in-

(Testimony of Joseph R. Schneider.)

volved—rather had become interested in an organization known as the Wendell Pine Mills of Idaho, and, of course, the Olympic Stud Mill. And the West Tenino Company, he had been in that. That company had not been profitable but it also—but it had been maintaining its equilibrium and was paying off its [65] obligations. The other companies were all in financial trouble.

So that he was quite involved and his financial position was improved materially by this composition of the debt with the John X. Johnson estate, which in effect was a gain of \$31,000.00.

Q. This composition that you are referring to was the payment of the indebtedness—

A. Of the \$75,000.00 note less some payments. I think the note was down to sixty thousand and it was—the composition was for \$29,250.00. So that there was a gain of some \$31,000.00 to Mr. Kerry there, and also the recovery of the insurance money from Lake Stevens wiped out a good many obligations that he was personally liable for and returned him a small amount, I think \$3,700.00 more than had previously been written off as a bad debt.

So the—and also in July 31st, the books did not give effect to this settlement of John X. Johnson. They still showed it as an outstanding obligation. His books were not always closed. The accountants who handled these affairs sometimes would let them go a month or two before they would get out a statement. So, we have used here—or I have used, rather, by selection this statement of August 31st, [66]

(Testimony of Joseph R. Schneider.)

1952, which shows the net worth of Mr. Kerry. This is a personal statement.

To begin with, in his background, you have to consider that Mr. Kerry was in the nature of a holding company. He was—he treated the H. E. Kerry Company as a separate entity, then he had his personal affairs, then the H. E. Kerry Company and he personally made investments in various corporations which he did business with. So that these investments were not the best evidence of his net worth, but the values of the—the net worth of the companies in which he had invested were in a customary accounting practice would be taken up as the values and not his investment. In other words, it's an example; in the Wendell Pine on this date, August the 31st—

Mr. Grunke: Maybe we'd better—I'm wondering what the materiality of all this might be for this hearing. I don't want to cut anybody short, but if we're going to go into a long accounting explanation that may not be material, I'd like to question it.

Mr. Krause: If we are only disposing of the question concerning the validity of the so-called pledge of December 30th, 1952, that would not be material. We've taken the position that Mr. Kerry was [67] insolvent on that date and that Mrs. Kerry did not pay for that with her independent separate funds but it was paid with community funds and those transfers should be set aside.

Mr. Grunke: But I mean, does this—and this

(Testimony of Joseph R. Schneider.)

accounting matter that you're going into now, does that particularly relate to those issues?

Mr. Krause: Yes, it shows this insolvency on the 28th day of July, 1952.

Mr. Grunke: But I mean, does it go into these issues as to whether Mrs. Kerry paid for this with her money or somebody else's money?

Mr. Krause: No.

Mr. Grunke: I'm just wondering—as I say, counsel, I don't want to cut anybody short but I'm just wondering what issues you're driving at with this question of solvency or insolvency; whether it's anything that's material to any of the petitions that are set down here today.

Mr. Krause: Well, the only question that we go into is to whether or not this was a proper transfer without consideration at the time the man was insolvent. As a trustee, we're not admitting that there was a good and sufficient consideration paid. We rely on the probable presumption that it was a community [68] property payment.

Now, of course, we don't have any further evidence as to whether or not this was paid in community or separate funds, and if the Court at this time made the finding that it was made from separate funds, this is not material.

Mr. Grunke: Well, I'll object to the questions and this line of evidence has no materiality to the issues here. That there was a good and proper

(Testimony of Joseph R. Schneider.)

transfer; the only uncontroverting evidence of interested and disinterested witnesses.

The Referee: Do you have any further evidence in regard to the separate or community funds?

Mr. Krause: No, I have no further evidence on that point.

The Referee: Do you wish to ask a continuance to investigate the stock or are you going to stand on the testimony of the petitioner's statement that this was purchased from stock she received from her former husband?

Mr. Grunke: We'll certainly be happy to furnish a statement whether you want to stand on it or not. We'll furnish it to you anyway. We don't want to question good faith here. We'll certainly furnish it to you whether you want it or not. [69]

The Referee: The reason I stated that, because my mind is made up and I think I can just give you an oral opinion here at this time, and, of course, in that event, why, this other question will be mute, be immaterial. So, if you wish a continuance first to investigate——

Mr. Krause: Is there any reason that you'd wish a continuance on that point, Mr. Schneider?

The Witness: No, I haven't any reason.

The Referee: Do you wish to be heard on that question?

Mr. Krause: No questions.

The Referee: Do you wish to answer?

Mr. Grunke: No, I think we've made our argument.

(Testimony of Joseph R. Schneider.)

The Referee: At this time the Court, after hearing the testimony on the petition, there's not a scintilla of evidence to the contrary they show—all the testimony of all the parties shows that this pledge is a result of money received by Mrs. Kerry from her former husband and which was her separate property and which was maintained throughout in a separate bank account or was kept separate and never had been commingled with community funds and that the pledge was for a certain consideration; namely, she withdrew this [70] money at the time of the signing the money to the First National Bank she received the assignment of this note and the property was pledged, and also as to the—from the corporation to the partnership, the assignment—releasing the assignment from the corporation to the partnership was a valid consideration; and, therefore the petitioner, Ruth B. Kerry—

Mr. Krause: There are some greater arguments as we go into the pledge. The only thing that I didn't have any argument on as to whether or not this was from a separate or a community fund.

The Referee: Well, the Court will hold that this was from her separate funds and that the pledge is her separate property.

Is that what you mean?

Mr. Krause: I do question the validity of the pledge, whether or not there was sufficient delivery in order to constitute a pledge of the property.

The Referee: Well, I haven't ruled on that point yet.

(Testimony of Joseph R. Schneider.)

Mr. Krause: Yes.

The Referee: I mean, I just—the pledge was given to her and the pledge to her is her separate property. Now, if there's any question of whether the [71] pledge is legal or valid in bankruptcy, do you wish to be heard on that question——

Mr. Krause: That's right.

The Referee: ——in regards to the notice?

Mr. Krause: Yes.

The Referee: I mean, I'm just ruling on that now to save your testimony because that would be immaterial, it would only be an immaterial question. In other words, this whole question is now is whether it complies with the '52 Amendment, the minutes of the Bankruptcy Act requiring notice.

Is that what you have in mind?

Mr. Krause: Requiring notice?

Mr. Grunke: Requiring perfections of the transfer.

Mr. Krause: Yes, requiring perfections.

Mr. Grunke: Well, I suppose I have the—do you want me to proceed in view of the fact that I'm the petitioner, or would you prefer to do it the other——

Mr. Krause: That's all right.

Mr. Grunke: ——way around? Which would be more convenient to the Court and counsel is perfectly all right with me. I can start or you can start.

The Referee: I think it would be proper, I believe, to hear first the petitioner. [72]

(Witness excused.)

Mr. Grunke: If the Court please, it has been established——

Mr. Krause: One thing further. I think you'll stipulate that there is nothing filed with the Secretary of State or with any other instrumentality for giving the statutory notice.

Mr. Grunke: That is correct and I so stipulate.

Also, I'd like to call Mr. Kerry, have Mr. Kerry back on this one—or perhaps we can stipulate this, too, or I can have him testify. But a question I forgot to ask him and that is: that the certificates, stock certificates, in 1952 were actually turned over to Mrs. Kerry from the bank. The endorsed certificates together with the other documents, is that correct? The stock certificates that were pledged to you in July of '52, did the bank turn those over to you when you picked up the pledge?

Mrs. Kerry: Yes.

Mr. Kerry: I don't know anything about that.

(Whereupon argument was given by respective Counsel.)

The Referee: The Court's never had an [73] opportunity to have a pledge of a partnership before. So, now I'll be honest with you, I'm not sure of myself.

You've got three things here you're talking about; one is a mortgage, another is an assignment and a pledge. Now, they're all different.

Mr. Grunke: Yes, I say, I'll mention something on that.

The Referee: In most of these you're talking of

an assignment. An assignment is a whole lot different. If Mr. Kerry had given his wife an assignment of her interest, she would actually own the interest and he would have nothing more to do with it. It's a lot different, an assignment which he refers to in most of these cases.

The question in my mind of whether—I'm not positive, I say—of whether a partnership interest is capable of being pledged or whether it has to be mortgaged with reference to creditors. Whether it's in the basis of accounts receivable as our Supreme Court ruled here in *Klauder versus Corn Exchange*——

Mr. Grunke: The Corn Exchange.

The Referee: The Corn Exchange case, whatever comes in that category. One would have to give some notice to creditors. In that case the Court held that you had to give notice to creditors. And, [74] of course in our case, state here we had no place you could give notice. You could file with the Secretary of State but at that time there was no such thing where you could give a notice. But, however, that is a bankruptcy case, the act has been amended.

Mr. Grunke: That's right.

The Referee: I don't know as Counsel stated that you can pledge this partnership interest. Ordinary effect you'd have to give possession of this, but if it's incapable and there's a possibility of how you're going to turn over a pledge to an interest in a partnership any more than he may hand him here your partnership agreement—or your interest

in a partnership agreement. What would be true there, so, I'm taking it under advisement and I'll appreciate it or allow either party 10 days, or I'll put it this way—it's your petition, I'll allow you—is 10 days sufficient or do you wish——

Mr. Grunke: I'd like to suggest this, if the Court please, and it's just a suggestion, I'll do whatever the Court states. As the Court's noticed, it's our petition when we get down to the legal arguments I'm somewhat at a loss until I hear counsel's argument, as to just what his attack is going to be. I think we have made a *prima facie* case of an assignment which on [75] it's face is purportedly that of—and we might save time, in fact, I think we might have saved time this afternoon if counsel had argued first and me second. My opening remarks were quite general and had to be——

The Referee: Well, I don't think there's much merit, it's only the two questions here first. There's not too much, but I say I'm not positive of it. Whether a partnership interest is capable of being——

Mr. Grunke: Sure.

The Referee: ——capable of being pledged——

Mr. Grunke: Oh, yes.

The Referee: ——or whether it must be under, more—if there's any notice required. And whether it comes under the Corn Exchange case as recalled.

Mr. Grunke: If the Court please, I think 10 days on those two points would be very ample.

The Referee: I will give you 10 days and will give you 10 days in which to answer it then. After

you received his copies or authorities, whichever it is.

Anything further?

The Court will stand adjourned. [76]

Certificate

I, Gerald E. Cole, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ GERALD E. COLE,
Reporter.

[Endorsed]: Filed June 15, 1954. [77]

In the United States District Court, Western
District of Washington, Southern Division

In Bankruptcy No. 15920

RUTH B. KERRY,

Petitioner-Appellant,

vs.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy
of Harold Edwin Kerry and the Community of
Harold Edwin Kerry and Ruth B. Kerry, His
Wife,

Appellee.

In the Matter of

HAROLD EDWIN KERRY and the Community
of HAROLD EDWIN KERRY and RUTH
B. KERRY, His Wife,

Bankrupts.

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure as amended, and Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith such of the original papers, pleadings and exhibits in the above-entitled cause as are designated

by the written Designation of the Appellant and the Cross-Designation of the Appellee herein, and the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Order of the Referee in Bankruptcy for the above District and Division, filed and entered on June 11, 1954, from which said Order a Petition for Review was filed in the said District Court; and from that Final Order of the above-entitled District Court, filed and entered on August 12, 1954, with respect to the said Order of the Referee, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, and are identified as follows:

1. Petition to Have Trustee Abandon Burden-some Asset and Permit Petitioner to Foreclose Pledge (filed by Referee Feb. 4, 1954).

2. Petition of Trustee to Have Referee Determine Title to Property and Require Persons in Possession to Turn Property Over to Trustee (filed by Referee Mar. 1, 1954).

3. Notice of Hearing Trustee's Petition to Void All Pledges, Assignments, Notes or Contracts, to Determine Title and Turn-over (filed by Referee Mar. 1, 1954).

4. Reply of Ruth B. Kerry to Petition of Trustee to Have Referee Determine Title to Property (filed by Referee Mar. 15, 1954).

5. Affidavit of Mailing of copy of Reply of Ruth B. Kerry (filed by Referee Mar. 15, 1954).

6. Memorandum Decision of O. M. Pitzen, Ref-

eree in Bankruptcy (filed by Referee May 11, 1954).

7. Motion on behalf of Ruth B. Kerry for Rehearing (filed by Referee May 14, 1954).

8. Findings of Fact and Conclusions of Law of O. M. Pitzen, Referee in Bankruptcy (filed by Referee June 11, 1954).

9. Order of O. M. Pitzen, Referee in Bankruptcy (filed by Referee June 11, 1954).

10. Petition for Review (filed by Referee June 15, 1954).

11. Affidavit of Mailing of copy of Petition for Review (filed by Referee June 15, 1954).

12. Referee's Certificate on Review (filed in Dist. Court June 17, 1954).

12a. Memorandum Decision of District Judge George H. Boldt (filed July 30, 1954).

13. Order of District Court denying Petition for Rehearing (filed Aug. 12, 1954).

14. Notice (of Ruth B. Kerry) of Appeal (filed Sept. 9, 1954).

15. Bond on Appeal (filed Sept. 9, 1954).

16. Statements of Points upon which Appellant Will Rely (filed Sept. 10, 1954).

17. Appellant's Designation of Record on Appeal (filed Sept. 10, 1954).

18. Affidavit of Service of Designation, etc. (filed Sept. 10, 1954).

19. Reporter's Transcript of Proceedings before Referee on March 18, 1954 (filed by Referee June 15, 1954).

19a. Appellee's Cross-designation of Record on Appeal (filed Sept. 15, 1954).

20. Motion for Transmittal of Original Exhibits (filed Sept. 17, 1954).

21. Order Directing Transmittal of Original Exhibits (filed Sept. 20, 1954).

22. Proof of Claim in Bankruptcy, of Ruth B. Kerry (filed by Referee Apr. 20, 1954).

I further certify that as part of the Record on Appeal I am transmitting herewith the following original exhibits, to wit:

Petitioner's Exhibits Nos. 1-10, inclusive (being a part of the Referee's Certificate on Review) (see Item 12).

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit: Notice of Appeal, Petitioner Ruth B. Kerry: \$5.00, and that said fee has been paid to the Clerk by the said Petitioner.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court, at Tacoma, Washington, this 27th day of September, 1954.

[Seal]

MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 14533. United States Court of Appeals for the Ninth Circuit. Ruth B. Kerry, Appellant, vs. Joseph R. Schneider, Trustee in Bankruptcy of Harold Edwin Kerry and the Community of Harold Edwin Kerry and Ruth B. Kerry, His Wife, Bankrupts, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed September 29, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14533

RUTH B. KERRY,

Petitioner-Appellant,

vs.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy
of Harold Edwin Kerry and the Community of
Harold Edwin Kerry and Ruth B. Kerry, His
Wife,

Appellee.

In the Matter of

HAROLD EDWIN KERRY and the Community
of HAROLD EDWIN KERRY and RUTH B.
KERRY, His Wife,

Bankrupts.

STATEMENT OF THE POINTS UPON WHICH
APPELLANT WILL RELY

1. Appellee (Trustee in Bankruptcy) is not entitled to recover, as an asset of the bankrupt estate, the partnership interest which had belonged to Harold Edwin Kerry, bankrupt, in that certain partnership known as West Tenino Lumber Company, for the reason that the same had, more than nine (9) months prior to bankruptcy, been assigned to Appellant; and an order should have been entered granting the petition of Appellant (Ruth B. Kerry, Petitioner) to have her interest in the said

partnership interest recognized, to order that the said Trustee and the said bankrupt estate have no interest in the said partnership interest, and otherwise grant Appellant's petition, because

(a) said partnership (see the partnership agreement, Exhibit "6" herein) was a partnership organized and existing within the State of Washington, and is governed by Washington law; and, under Washington law, Appellant had acquired all of the right to the said partnership interest of the bankrupt more than nine (9) months prior to the filing of the Petition in Bankruptcy by Harold Edwin Kerry in the above Cause, by virtue of an assignment by bankrupt of the said partnership interest to Appellant for a good and valuable consideration; and the statutes of the State of Washington with respect to partnerships and partnership rights expressly permit and provide for the assignment of the same;

(b) the aforesaid assignment of partnership interest was made by instrument in writing (Exhibit "9") executed by the above-named bankrupt and delivered to Appellant on the date that the said assignment was made, and the partners other than bankrupt were advised thereof; said assignment was pursuant to an agreement of even date therewith (Exhibit "4");

(c) the assignment aforesaid by bankrupt to Appellant was as security for a loan in the sum of Twenty-nine Thousand Two Hundred Fifty Dollars (\$29,250.00), together with interest thereon,

pursuant to the terms of a promissory note (Exhibit "2"), and, as of the date of bankruptcy, the entire sum owing upon the said note, together with all accrued interest thereon, was due and payable, and unpaid, and the value of the said partnership interest was less than the sum owing upon the said note;

(d) under the law of the State of Washington, the rights of Appellant with respect to the said partnership interest are superior to the rights of a trustee in bankruptcy; and, under Washington law, at no time subsequent to the making of the assignment could a lien upon such partnership interest obtainable by legal or equitable proceedings on a simple contract become superior to the rights of Appellant (assignee);

(e) at the date of bankruptcy, no creditor of bankrupt could have obtained a lien by legal or equitable proceedings upon the said partnership interest which would be superior to the rights of the Assignee-Appellant; and

(f) Appellant (Ruth B. Kerry, Petitioner) is entitled to the aforesaid partnership interest of bankrupt and Appellee (Trustee in Bankruptcy) is not entitled to the said interest, nor to any rights therein.

2. It was error to enter the Final Order, entered by the District Court in the above matter on the 12th day of August, 1954, denying Appellant's motion for a rehearing, denying Appellant's Peti-

tion for Review of the Findings of Fact, Conclusions of Law and Order of the Referee in Bankruptcy, dated June 11, 1954, and affirming the said Findings of Fact and Conclusions of Law and Order of the said Referee in Bankruptcy, dated June 11, 1954, for the reason that the said Order of the said Referee in Bankruptcy and the said Findings of Fact and Conclusions of Law are in error in the following respects:

(a) In stating in Finding of Fact No. III that, at the time of filing of the Bankruptcy Petition herein, the assets of the bankrupt totalled \$39,974.89, and that one of said assets of the bankrupt was a 45/88ths interest in a partnership known as West Tenino Lumber Company (which conclusion is not supported by the record herein and is contrary to the remaining findings of fact, which establish that the said partnership interest was assigned to Petitioner (Appellant); and which, furthermore, is a conclusion of law and not properly a finding of fact); and in stating in said Finding of Fact No. III that the value of the said 45/88ths interest as of the date of the filing of the Bankruptcy Petition was \$22,000.00.

(b) In making Conclusion of Law No. I, stating that the interest of Harold Edwin Kerry in the said partnership is an asset of the bankrupt estate, for the reason that the said Conclusion of Law is contrary to the findings herein which establish that said interest was assigned to Petitioner (Appellant).

(c) In making Conclusion of Law No. II, stating that the assignment of the said partnership interest is an incomplete pledge of an open book account and not effective as against the Trustee in Bankruptcy (Appellee herein), and that the said Trustee takes title to the said partnership interest free of any rights of Appellant-Assignee, for the reason that the said conclusions are contrary to the findings of fact herein which establish that the transaction was not a pledge of an account receivable, but an assignment of partnership interest to Petitioner (Appellant).

(d) In making Conclusion of Law No. III, stating that the 45/88ths interest of the bankrupt in the partnership is not a burdensome asset of the estate and that the Petition of Ruth B. Kerry (Appellant herein) should be denied, for the reason that the findings of fact establish that the said Petition should be granted, that the debt secured by said assignment exceeds the value of said partnership interest, and there is no asset value in the said partnership interest for the estate herein; and for the reason that the said conclusions are not supported by the findings of fact or by the record herein.

(e) In making Conclusion of Law No. IV, stating that, upon the dissolution of the aforesaid partnership, the Appellee, Trustee in Bankruptcy, shall be entitled to receive all of the right, title and interest in and to assets distributed as a result of liquidation of the 45/88ths interest which Harold

Edwin Kerry had assigned to Petitioner, Ruth B. Kerry (Appellant) for the reason that the findings of fact establish that Appellant is entitled, by virtue of the assignment and the Uniform Partnership Act, to the assets or proceeds of the said 45/88ths interest until she has received the sum of \$29,250.00, together with the interest on the note evidencing the same, and such other relief as the note provides, that the said 45/88ths interest is of a lesser value than the said sum of \$29,250.00, and that the Trustee consequently has no interest therein; and for the reason that the said conclusions of law are not supported by the findings of fact or the record herein.

(f) In making Conclusion of Law No. V, stating that the effect of granting the Petition of Ruth B. Kerry (Appellant) recognizing her rights under the assignment of the said partnership interest would be to enable her to obtain a greater percentage of her debt than some other creditor of the same class, for the reason that the assignment of the partnership interest conveyed to the Appellant a property right and made her a secured creditor, and for the further reason that there are no findings of fact and there is nothing in the record herein to support any such conclusions as appear in Conclusion of Law No. V.

(g) In making any and all other conclusions of law (whether in the form of Conclusions of Law or purportedly in the form of Findings of Fact) stating expressly or in effect that the assignment by bankrupt to Appellant of the aforesaid partner-

ship interest was not completed as required by law of the State of Washington or that any dominion or control of the same was retained by bankrupt assignor contrary to law, or that any other act or condition not actually performed was required by Washington law in order to make the assignment valid and effective either as against a third person other than a buyer in the ordinary course of trade, or as against a subsequent lien upon such partnership interest obtainable by legal or equitable proceedings on a simple contract.

3. It was error to enter the Final Order made in the above Cause by the District Court on the 12th day of August, 1954, as aforesaid, and error for the said District Court to affirm the Findings of Fact, Conclusions of Law and Order of the Referee in Bankruptcy, for the reason that the said Referee and the said District Court erred in failing to enter conclusions of law and an order stating substantially as follows:

(a) That on the date of the filing of the Bankruptcy Petition in the above-entitled Cause, Harold Edwin Kerry was a partner in the partnership known as West Tenino Lumber Company and had theretofore, for good and valuable consideration, assigned his interest in the said partnership to Petitioner, Ruth B. Kerry (Appellant), and that any interest which the said Harold Edwin Kerry had in the said partnership was as of the date of the filing of the said Bankruptcy Petition, subject to the said assignment.

(b) That the aforesaid assignment of partnership interest from H. E. Kerry to Appellant is a valid and effective assignment and is a transfer so far perfected as to be valid and effective as against the Trustee in Bankruptcy herein, and that the rights of Appellant under and by virtue of the said assignment of partnership interest are superior to the rights of the Trustee (Appellee) herein.

(c) That the value of the said 45/88ths interest in the aforesaid partnership was, as of the date of the filing of the Bankruptcy Petition in the above-entitled Cause, and now is substantially less than the principal sum of \$29,250.00 owing to the Appellant, and consequently, the estate has no interest in the said partnership which is of any value, and that to attempt to administer the said interest in the partnership would be burdensome to the estate.

(d) That the petition of Ruth B. Kerry (Appellant) should be granted and that the Trustee (Appellee) should be directed to abandon any claimed interest in the aforesaid partnership and that the Appellant be authorized and permitted to acquire by assignment and bill of sale from a bankrupt, by foreclosure of the said assignment, or otherwise, in any court of competent jurisdiction other than this Court of Bankruptcy, all interest in the said 45/88ths interest in the aforesaid partnership.

(e) That the Referee erred in failing to enter an order: Granting the Petition of Appellant, Ruth B. Kerry, authorizing and directing the Appellee, Trustee in Bankruptcy herein, to abandon any claim

with respect to the aforesaid partnership for the reason that the same would be burdensome to the estate, and authorizing Appellant to acquire, by further assignment and bill of sale from the bankrupt, foreclosure or otherwise, in any court of competent jurisdiction other than this Court of Bankruptcy, all interest in and to the said 45/88ths interest in the aforesaid partnership.

4. It was error for the District Court to refuse to enter an order upon the aforesaid Petition for Review, overruling the Order of the Referee in Bankruptcy, dated June 11, 1954, and directing the entry of Conclusions of Law and of an Order as prayed for by the said Petitioner (Appellant herein) and as set forth hereinabove.

BOGLE, BOGLE & GATES,

/s/ ARTHUR G. GRUNKE,

Attorneys for Appellant.

[Endorsed]: Filed September 29, 1954.

In The United States
Court of Appeals
For the Ninth Circuit

RUTH B. KERRY,

Appellant,

vs.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy of
Harold Edwin Kerry and the Community of Harold
Edwin Kerry and Ruth B. Kerry, his wife, Bankrupt.

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

BOGLE, BOGLE & GATES
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603 Central Building
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FILED

FEB 20 1937

PAUL E. D'UGHEN,

CLERK

In The United States Court of Appeals

For the Ninth Circuit

RUTH B. KERRY,

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vs.

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In The United States Court of Appeals

For the Ninth Circuit

No. 14533

RUTH B. KERRY,

Appellant,

vs.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy of
Harold Edwin Kerry and the Community of Harold
Edwin Kerry and Ruth B. Kerry, his wife, Bankrupt,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court, which is not reported, is included in the record herein (R. 48-50).

JURISDICTION

This is an appeal from an order of the District Court which affirmed, on petition for review, findings of fact, conclusions of law and an order of the referee in bank-

ruptcy. The referee's findings of fact and conclusions of law appear at R. 29-37, the referee's order at R. 38-9, the petition for review at R. 40-5, and the district court's order at R. 50-1. The referee in bankruptcy and the district court held that the assignment of a partnership interest as security for a loan, approximately nine months before bankruptcy, is not valid as against the assignor's trustee in bankruptcy. The proceeding was initiated by appellant assignee's petition filed in a pending bankruptcy proceeding in the bankruptcy court for the Western District of Washington, Southern Division (R. 3-11), and respondent's petition to the same bankruptcy court to determine the right, title and interest of appellant and respondent in and to the partnership interest in question (R. 12-14). Appellant filed a reply (R. 15-16).

The bankruptcy court's jurisdiction is based upon §2 of the Bankruptcy Act of June 22, 1938, 52 Stat. 840, 11 U.S.C. §11, as amended. The bankruptcy court entered its findings of fact, conclusions of law and order denying appellant's petition on June 11, 1954. As the findings of fact (finding III, R. 30-1) and the pleadings (R. 5) establish, the order appealed from involves substantially more than \$500.00. On June 15, 1954, a petition for review by the United States District Court for the Western District of Washington, Southern Division, was filed by appellant pursuant to §39 of the Bankruptcy Act, 11 U.S.C. §67. On August 12, 1954 the District Court entered its order

affirming the findings of fact, conclusions of law and order of the bankruptcy court. The jurisdiction of this court rests on §24 and §25 of the Bankruptcy Act, 11 U.S.C. §47 and §48, pursuant to which appellant filed her notice of appeal and the bond on appeal on September 9, 1954.

QUESTION PRESENTED

Whether the assignment by bankrupt of his interest in a partnership of which he was a member, as security for a loan, nine months prior to the institution of the bankruptcy proceedings, is valid as against the trustee in bankruptcy, under the applicable law of the State of Washington and the provisions of the Bankruptcy Act.

STATEMENT OF THE CASE

This case relates to the assignment by a partner of his partnership interest as security for a loan. The substantial question at issue is whether, under the law of the State of Washington as applied pursuant to the Bankruptcy Act, the assignment of the partnership interest is valid as against the trustee in bankruptcy of the assignor.

The present bankrupt* and three other individuals (not parties to this proceeding) were the partners. The assignment by the bankrupt of his interest in the partnership was made pursuant to R.C.W. §25.04.270, Uniform Partnership Act §27. The partnership itself made no assign-

*Harold E. Kerry, together with the community, was adjudicated a bankrupt. Ruth B. Kerry, in her separate capacity, is solvent and did not petition individually for bankruptcy, and she was not adjudicated a bankrupt.

ment. The partnership is solvent. Appellant is the assignee of the partnership interest. Respondent is the trustee in bankruptcy of the assignor-partner.

The assignor was adjudicated a bankrupt on October 2, 1953, upon his voluntary petition filed on the same day. The assignment of the partnership interest was made on the day the partnership was formed, December 30, 1952. This was a little more than nine months prior to the filing by the assignor of his bankruptcy petition. Prior to December 30, 1952, the business had been conducted as a corporation, and since July 28, 1952, bankrupt's shares of stock had been pledged to appellant. The sequence of significant events is as follows:

In 1949, West Tenino Lumber Co. was incorporated, and bankrupt acquired approximately 51% of the issued shares of stock. Thereafter, bankrupt pledged his shares of stock to Seattle-First National Bank to secure a loan. In July, 1952, the bank insisted on payment. Appellant had separate funds of her own, which she had inherited from her former husband; and on July 28, 1952, she loaned \$29,250.00 from her separate property to bankrupt. Bankrupt pledged his West Tenino shares to appellant (and also his shares in Olympic Stud Mill, Inc., which latter are not in issue in this proceeding). Petitioner's Exhibit No. 2 (R. 71) is the promissory note to evidence the \$29,250.00 loan; Petitioner's Exhibit No. 3 (R. 73-75) is the pledge agreement.

In December, 1952, the shareholders of West Tenino Lumber Company sought to dissolve the corporation and conduct the business as a partnership. By written agreement of December 30, 1952 (Petitioner's Exhibit No. 4, R. 81-83), appellant permitted the pledged shares of stock to be voted in favor of dissolution, and by the terms of the written agreement the pledgor's (now bankrupt's) partnership interest in the resulting partnership was to be simultaneously assigned to appellant as security for the loan. The corporation was dissolved on the same day by filing the certified copy of the dissolution resolution with the Secretary of State of the State of Washington (Petitioner's Exhibit No. 5, R. 83-87). Simultaneously, the partnership came into existence (Petitioner's Exhibit No. 6, R. 87-94), and the corporate trustee in dissolution conveyed the assets to the partnership (Petitioner's Exhibit No. 7, R. 94-97). On the same day, December 30, 1952, bankrupt delivered the executed assignment of his partnership interest (Petitioner's Exhibit No. 9, R. 100) to appellant. The shares in Olympic Stud Mill, Inc., were released from the pledge. There were three other partners, and they all had actual knowledge of the former pledge of the shares of stock and of the assignment of the partnership interest. (R. 134-135; cf. finding of fact IX, R. 33, 35.) The partnership continued in existence until the assignor-partner's bankruptcy.

The assignment of the partnership interest was made

pursuant to the Washington statute (Uniform Partnership Act), R.C.W. §25.04.270 (§27 of the Uniform Act). The Act does not require any filing or any notice (in fact, it makes no provision for filing.) However, as pointed out, the other partners had notice of the assignment. Appellant of course did not have possession of partnership assets, inasmuch as no partner nor his assignee has any right to the possession of partnership assets. R.C.W. §§25.04.250 and 25.04.260 (§§25 and 26 of the Uniform Act). As pointed out above, appellant was the assignee of an individual partner's interest in the partnership. The partner's interest in the partnership is in the nature of an intangible asset, as distinguished from tangible property. See R.C.W. §§25.04.250 and 25.04.260 (§§25 and 26 of the Uniform Act.)

The assignment was not filed or recorded.

Bankrupt was the manager for the partnership.

It may be noted that appellant from time to time loaned substantial additional sums to bankrupt, without any security, and that at the date of bankruptcy the sums owing on unsecured loans totaled \$42,066.87. (R. 16-21, 126.)

In this proceeding, the Referee in Bankruptcy held that the assignment was not valid as against the trustee in bankruptcy, on the grounds that it was not perfected because assignee was not placed in possession of any partnership property, and that an assignment of a part-

nership interest is an assignment of an account receivable, and not valid unless notice of account receivable financing is filed (Referee's Memorandum Decision, R. 22-28). On petition for review to the district court, the court affirmed the referee, but only on the ground that since the assignee of the individual partner did not exercise dominion or control over, or take possession of, any partnership assets, the assignment was not valid as against the trustee. (Memorandum Decision of District Court, R. 48-50).

For the convenience of this Honorable Court, there are set forth in the appendix to this brief the texts of the applicable provisions of §§60 and 70 of the Bankruptcy Act, and the applicable provisions of the Partnership Act and the Account Receivable Act.

SPECIFICATION OF ERRORS

The principal issue is a question of law, namely, did the referee and the district court err in holding the assignment invalid (specifications of error in findings of fact are primarily directed to reiterations of the conclusions of law appearing in the findings of fact.) Appellant makes the following specification of errors:

1. The district court erred in entering its order denying appellant's petition for review and affirming the Referee's findings of fact, conclusions of law and order of June 11, 1954, pursuant to the court's Memordandum Decision holding that the assignment of the partnership interest

by one of the individual partners is not valid as against that partner's trustee in bankruptcy.

2. The district court erred in failing to reverse the order and conclusions of the referee in bankruptcy as prayed in appellant's Petition for Review.

3. The referee in bankruptcy erred in entering the Order of June 11, 1954 adjudging that the appellant (assignee of the partnership interest) has no right, title or interest in the assignor's (bankrupt's) partnership interest and that the said partnership interest is an asset of the bankrupt estate.

3. The referee in bankruptcy erred in his conclusions that the assignment of the partnership interest is a pledge of an open book account and not effective as against the assignor's trustee in bankruptcy, and that giving effect to the said assignment would enable appellant to receive a greater percentage of her debt than some other creditor of the same class, and in his conclusion which appears in the findings of fact that appellant assignee exercised no dominion or control over any partnership interest of the assignor.

4. The referee in bankruptcy erred in his conclusion that the assigned partnership interest is an asset of the bankrupt and of the bankruptcy estate, and in refusing to grant appellant's petition to permit her to foreclose upon the said assignment or otherwise exercise her rights under the assignment as prayed for in her petition.

SUMMARY OF ARGUMENT

I.

The trustee in bankruptcy (respondent herein), by virtue of section 70a of the Bankruptcy Act (11 U.S.C. §110a), acquires whatever title to property the bankrupt may have had, and a transfer made by the bankrupt prior to bankruptcy is recognized unless some specific provision of the Bankruptcy Act avoids it. 4 *Collier on Bankruptcy* page 951; *Schultz v. England*, 106 F. 2d 764, 768. Rights to property are determined by state law (*Schultz v. England*, supra; 4 *Collier*, pages 1347-8), except to the extent that sections 60, 67 or 70 of the Bankruptcy Act may be applicable (11 U.S.C. §§96, 107 and 110). In this case, section 67 has no application.

II.

A. Section 60 invalidates certain transfers as "preferential" if made within four months before bankruptcy, and section 70 gives the trustee in bankruptcy all the rights of an execution creditor. To determine whether a transfer was made prior to or within the four months period, section 60a(1) and (2) state that a transfer by the bankrupt of personal property shall be deemed to have been made when it became so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee (the "execution creditor")

test). Section 70c also employs the execution creditor test. Whether a transfer is effective against execution creditors is to be determined by state law. 3 *Collier* 913, 915; 4 *Collier* 1263. The assignment here was given more than four months before bankruptcy; and if under Washington law the assignment was valid against execution creditors when it was given, it is valid as against the trustee.

B. The transfer here was an assignment to appellant by a partner (the bankrupt) of *his interest in* a partnership. Under Washington law such an interest is personal property (R.C.W. §25.04.260, Uniform Partnership Act §26; *Davis v. Alexander*, 25 Wn. 2d 458, 171 P. 2d 167), and it is assignable (R.C.W. §25.04.270, Uniform Partnership Act §27). By the terms of the statute, the assignee is "entitled" to receive the assigning partner's share of the profits and, upon dissolution, the assigning partner's interest in the partnership.

No partner has any right to possess partnership assets for his own purposes, but only as an agent of the partnership. The partner's interest in the partnership is simply his share of the profits and surplus. R.C.W. §§25.04.250 and .260, Uniform Partnership Act §§25 and 26. When the partner assigns this intangible personal property, the assignee acquires his right to receive his share of the profits and surplus.

C. Under Washington law, assignments of intangibles are effective as against execution creditors the moment the assignment is given, and the law does not require, or even make provision for filing or recording the same. *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128; *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238; *Lloyd L. Hughes, Inc., v. Widders*, 187 Wash. 452, 60 P. 2d 243. The assignment is valid even if no notice of the assignment is given to the obligor. *Bellingham Bay Boom Co. v. Brisbois*, supra; *Cox v. Bateman*, 139 Wash. 135, 245 Pac. 928. It may be noted, however, that in this case notice of the assignment was given to the other partners.

D. There are three exceptions to the general rule that assignments of intangibles are effective as against execution creditors of the assignor:

1. Since 1947, accounts receivable have been subject to the filing requirements of the Washington Account Receivable Act, R.C.W. §§63.16.010 et seq. However, a partners interest in the partnership is not an account receivable (R.C.W. §63.16.010). A debtor-creditor relationship is necessary to the applicability of the statute. Paton's *Accountant's Handbook*, sections 6 and 7; 1 *American Jurisprudence*, "Accounts and Accounting", §§2-6, 16; *Chicago, Milwaukee & St. Paul Railway v. Frye & Co.*, 109 Wash. 68, 186 Pac. 668; *Goodwin v. Northwestern Mutual Life Insurance Co.* 196 Wash. 391, 83 P. 2d 231.

2. If, *by agreement* between the assignor and assignee, the assignor is permitted to collect the assigned sums *and* apply them for his (the assignor's) own purposes, then, as a matter of law, the assignor is deemed to have retained title or dominion to the property, and the assignment is deemed fraudulent in law. *Fales Co. v. Seiple Co.*, 171 Wash. 630, 19 P. 2d 118; *Benedict v. Ratner* 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 991. However, in the case before us, there is no evidence whatever that any such agreement existed. To the contrary, the partnership act by its very terms "entitled the *assignee* to receive" the assigning partner's share of the profits and surplus of the partnership. The record and the findings leave no doubt that appellant assignee's properties were kept separate from bankrupt's. Neither the referee nor the district court was able to make any finding that bankrupt assignor was given the right to collect the assigned sums and use them for his own purposes. The referee's conclusions (affirmed by the district court) that title or dominion did not pass to appellant are in error.

3. Where an assignment is given of an intangible which is represented by an instrument, the endorsement and delivery of which is indispensable to transfer the property, the attempted assignment of the intangible will not be effective against execution creditors without endorsement and delivery of the indispensable instrument. Negotiable instruments, certificates for shares of stock,

and negotiable warehouse receipts are common examples of such instruments. Since no such instrument exists with respect to a partnership interest, such cases as *Kietz v. Gold Point Mines, Inc.*, 5 Wn. 2d 224, 105 P. 2d 71, and *Hastings v. Lincoln Trust Company*, 115 Wash. 492, 197 Pac. 627 (cited in opinions below), have no application to the case here on appeal.

The assignment to appellant was effective against bankrupt's (assignor's) execution creditors when given, which was more than four months before bankruptcy; and consequently it is valid as against the respondent trustee.

III.

The technical exceptions of section 60a(6) of the Bankruptcy Act do not affect the validity of the assignment here, for these reasons:

A. Section 60a(6) relates *only* to certain types of *equitable* assignments, whereas the assignment here in question is a legal, not an equitable assignment. R.C.W, §§25.04.270, 4.04.020, 4.08.010, 4.08.080; 4 Pomeroy's *Equity Jurisprudence* (Fifth Edition), pages 787-8, 790-1.

B. Section 60a(6) does not even affect all equitable assignments, buy only those where state law *requires* a written instrument of assignment, filing or recording, or the like, as a condition to validity against third persons. However, Washington law does not even require that the assignment be in writing (*Horchover v. Pacific Marine*

Supply Co., 171 Wash. 330, 17 P. 2d 915), nor is notice to the obligor necessary (*Bellingham Bay Boom Co. v. Brisbois*, supra; *Cox v. Bateman*, supra). Nevertheless, in the case at bar, there was a signed and delivered assignment, and actual notice was given to the other partners. There was no violation of any provision of section 60a(6).

C. If it should be contended that a partner's interest in the partnership is only an equitable interest, then the technical provisions of section 60a(6) will have no application in view of the *proviso* in the last sentence, which reads: "Provided, however, That where the debtor's [i. e., bankrupt's] own interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character." See also *Mulhern v. Albin*, 163 F. 2d 41, 43; *In re Estes*, 105 F. Supp. 761. 766.

Section 60a(6) does not affect the assignment here in question. The controlling provisions of the Bankruptcy Act are sections 60a(1) and (2) and 70c, which recognize the validity of a transfer (e. g., an assignment) which is valid under state law as against execution creditors of the assignor. Since the assignment to appellant in the present case is valid against execution creditors under the law of Washington, it is valid against the respondent trustee.

IV.

There is no question that the debt secured by the assignment of bankrupt's interest in the partnership

greatly exceeds the value of the partnership interest, and the respondent trustee should be directed to abandon any claim to the partnership interest, since it has no value to the estate. 4 *Collier*, pp. 1216-8. The order of the district court should be reversed and the case remanded for entry of an order granting the relief prayed for by appellant.

ARGUMENT

I

TRANSFERS (INCLUDING ASSIGNMENTS) ARE VALID AS AGAINST TRUSTEE IN BANKRUPTCY EXCEPT AS PROVIDED IN §§60, 67 AND 70 OF THE BANKRUPTCY ACT

The problem before this court is whether the referee in bankruptcy and the district court erred in holding that the assignment by a partner, of his partnership interest, is invalid as against the trustee in bankruptcy of the partner.

It is axiomatic that a trustee in bankruptcy takes only such title to property as the bankrupt may have had at the date that the bankruptcy petition was filed. Transfers made by the bankrupt prior to bankruptcy are effective as against the trustee, in the absence of the applicability of specific exceptions in the Bankruptcy Act itself. See 4 *Collier on Bankruptcy* (14th Edition), page 951:

“Accordingly, the general rule and the exceptions have been summarized in this fashion:

'Under section 70(a), the trustee is vested with the title of the bankrupt to all of his possessions and choses in action at the date petition is filed, except that exempt to him under the laws of the state.

'The trustee takes such property not as an innocent purchaser, but subject to all valid claims, liens and equities enforceable against the bankrupt, except in cases where there has been a conveyance or encumbrance which is void or voidable as to the trustee by some positive provision of the Bankruptcy Act.'" [citing *Matter of Toms* (CCA-6), 101 F. 2d 617, and other decisions.]

This court has expressed the rule in *Schultz v. England* (CCA-9), 106 F. 2d 764, 768, as follows:

"Turning then, to the appeal on its merits, we examine the California law as to the ownership of the equipment in question. *It is elemental that the trustee stands in the shoes of the bankrupt (except as against fraudulent conveyances and similar transactions, which are not here involved) and can assert no greater rights against the landlord than could have been asserted by the bankrupt in the absence of the bankruptcy proceedings.* If, then, under the California law the bankrupt had the right to remove the equipment in question, it follows that the decision of the district court confirming title in the trustee in bankruptcy should be affirmed." [italics supplied]

Section 70 of the Bankruptcy Act (11 U. S. C., §110) provides:

"§70. Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the

petition * * * initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located * * * (5) property including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * ”

Accordingly, it has consistently been held that, except for specific exceptions provided in the Bankruptcy Act, state law is determinative of the rights of the trustee and claimants and other parties. *Schultz v. England*, supra. In 4 *Collier*, pages 1347-8, the authors state, with numerous citations:

“It is without dispute that the actual *existence and effect of all liens, claims and equities*, as distinguished from validity or invalidity under the provisions of the Bankruptcy Act, *is a matter to be determined by the appropriate state law*, as expounded by the decisions of the state courts. If anything was needed to settle this proposition, *Erie Railroad Company v. Tompkins* has done so. Of course, in the unusual case where a federal statute is invoked as the basis for a lien or claim, that statute as interpreted by the federal courts will control. It should be noted that in the absence of decisions by the highest court of a state, decisions of intermediate or lower courts will govern as to the interpretation of state law.” [italics supplied]

In the case at bar, the transfer in question is an assignment of an interest in a partnership which operated a mill at Tenino, Washington (findings of fact VIII and IX, R. 32-35). The assignment was executed on December 30,

1952, "simultaneously with" the creation of the partnership. Finding of fact IX, R. 33. The statutes of the State of Washington expressly recognize assignments of partnership interests by a partner, and expressly provide that the assignment "entitles the assignee to receive in accordance with the contract the profits to which the assigning partner would otherwise be entitled" *and* in the event of dissolution "to receive his assignor's interest." The assignee may require an account from the date of the last account agreed to by all the partners. R. C. W. §25.04.270, Uniform Partnership Act, §27.

Consequently, under the rules referred to above, the respondent trustee can assert no title or right to the partnership interest in derogation of the rights of the appellant assignee, unless some provision of the Bankruptcy Act specifically avoids the effect of the assignment. The provisions of the Bankruptcy Act which can be invoked to test the effectiveness of a transfer are section 60 (11 U.S.C., §96), section 67 (11 U.S.C., §107) and section 70 (11 U.S.C., §110). Sections 60 and 70 will be discussed in succeeding sections of this brief.

There has been no suggestion by the respondent, either in the district court or before the referee, that there is any basis for considering section 67. Section 67a invalidates liens obtained by attachment, levy and the like, within four months before bankruptcy. Sections 67b and 67c relate to liens of employees, mechanics, landlords,

states and subdivisions, and of the United States. Section 67d invalidates certain transfers without consideration or otherwise in fraud of creditors. The findings of fact in the case at bar establish that the assignment before us was supported by ample consideration, i.e., substitution for pledges of shares of corporate stock (finding of fact IX, R. 33-5), and that the pledges of the shares of stock had been given for a concurrent loan of \$29,250.00, which were the separate funds of appellant (findings of fact IV and V, R. 31). These findings are in accord with the views expressed by the referee at the close of the trial (R. 141) and in his memorandum opinion (R. 23-4).

For these reasons, it appears that only sections 60 and 70 merit consideration herein.

II.

THE ASSIGNMENT HERE IS NOT INVALIDATED BY §§60a,
(1) AND (2) OR 70c OF THE BANKRUPTCY ACT

A. §§60a (1) and (2) and 70c Recognize as Valid Transfers Which, under Applicable State Law, Are Valid as against Execution Creditors of Assignor.

The provisions of the Bankruptcy Act under which a trustee may attempt to attack a transfer are sections 60 and 70 (11 U.S.C., §§96 and 110). Section 60 declares that certain types of transfers are preferences and may, under circumstances there outlined, be avoided in bankruptcy. Section 70c declares that the trustee has the rights

of an execution creditor. Section 70e declares that a transfer which under any federal or state law is fraudulent or voidable by any creditor of the bankrupt having a claim provable against the estate, shall be null and void as against the trustee. Section 70e may be disregarded in view of the fact that no fraudulent transfer is here involved, and there are no preference statutes in the State of Washington with respect to transfers by persons other than corporations.

The transfer here in question (the assignment of the partnership interest) "was executed and delivered" on December 30, 1952. Finding of fact IX (R. 33, 34). The bankruptcy proceeding was not commenced until October 2, 1953. Finding of fact I (R. 30). More than nine months elapsed between the making of the assignment and the commencement of the bankruptcy proceedings. Since more than four months elapsed (see section 60a(1): "transfer * * * made * * * while insolvent and within four months"), the assignment will be immune to attack under section 60a, unless the effectiveness of the transfer is impaired under subdivision (2) thereof.

Subdivision (2) of section 60a is the general provision fixing the time when a transfer shall "be deemed to have been made" for the purpose of ascertaining whether or not the trustee can successfully attack the transfer. Subdivision (2) establishes one test for real property and a different test for "other property." Regardless of the date

of the documents, "a transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee." With respect to property *other than realty*, the first sentence of subdivision (2) states:

"(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee."

Since the property which is the subject of the transfer in the case before us is a partner's interest in a partnership, and is personal property (R.C.W. §25.04.260, Uniform Partnership Act §26), the "execution creditor" test of the first sentence of paragraph (2) is applicable. Consequently, if the assignment of the partnership interest, under Washington law, is effective as against execution creditors of the assignor, it will be deemed to have been made at the time of its execution—namely December 30, 1952, which was considerably more than four months before bankruptcy—and it will not be subject to avoidance by a trustee. If the assignment was ineffective as against execution creditors of the assignor, then the assignment will be deemed to have been made immediately before

bankruptcy, and consequently within the four months period.

It should be noted here that section 70c also utilizes an "execution creditor" test: "The trustee, as to all property * * * upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Consequently, the issue before us is whether, subsequent to the execution of the assignment of the partnership interest on December 30, 1952, a creditor of the assigning partner could have obtained a lien by legal or equitable proceedings superior to the rights of the appellant assignee. This issue is to be determined under the law of the State of Washington. See 3 *Collier* 913, 915, and 4 *Collier* 1263:

"It is evident that, under §60a, the determination of when a transfer is perfected depends almost wholly on state law * * *." 3 *Collier* 913.

"Any notions that such matters were determinable by a general federal equity jurisprudence, or that the question as to the necessity of notice to the debtor for the completion of a legal assignment was a matter of general law, have been effectively dissipated by the doctrine of *Erie Railroad Co. v. Tompkins*, which clearly established the complete applicability of state law in non-federal matters." 3 *Collier* 915.

" * * * Therefore, the trustee's powers, in every case governed by this portion of §70c, are those which the state law would allow to a supposed creditor of the bankrupt who had, at the date of bankruptcy, completed the legal (or equitable) processes for perfection of a lien upon all the property * * *." 4 *Collier* 1263.

See also, *Schultz v. England* (CCA-9), *supra*.

In the succeeding sections of this brief the effectiveness of the assignment here in question as against execution creditors, under Washington law, is discussed.

B. A Partner's Interest in the Partnership Is Intangible Personal Property under the Uniform Partnership Act, and Is Assignable.

The assignment with which we are concerned was *not* an assignment made by a partnership. Rather it is an assignment by a partner *of his interest in* the partnership. This partnership interest is personal property (R.C.W. §25.04.260, Uniform Partnership Act §26), and is assignable (R.C.W. §25.04.270, Uniform Partnership Act §27). Section 25.04.260 states:

"*Nature of Partner's Interest in the Partnership.* A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property."

The courts have consistently followed the rule that a partner's interest in the partnership is personal property, regardless of whether the partnership assets, as such, consist of realty, personalty, or both. *In Davis vs. Alexander*, 25 Wn. 2d 458, 171 P. 2d 167 (a suit for dissolution of

a partnership and accounting, commenced before the enactment of the Uniform Partnership Act), the court said:

“ ‘Where land is purchased for sale and profit, it may, in equity, be regarded as personalty as among the partners.’ ” 25 Wn. 2d 465.

and further:

“ * * * The land of the partnership is regarded in equity as personalty, and, when either partner handled it, either in purchasing or selling, he was not dealing in real estate for another, he was representing the partnership and disposing of a real estate asset of the partnership the same as if it were personal property.” 25 Wn. 2d 458, 466.

R.C.W. §25.04.260, quoted above, has made the equitable rule of *Davis v. Alexander* a rule of law (although as will be observed hereinafter in Section III,C, of this brief, appellant's position is equally strong whether the partnership interest of the assigning partner be deemed a legal or an equitable interest). Decisions from many jurisdictions evidence the general application of the rule in dissolution and accounting suits, probate proceedings, execution proceedings, and the like. 7 *Uniform Laws Annotated*, pp. 153-9, and 1954 pocket supplement, pp. 57-61. Among other authorities is the decision in *LaRusso v. Paladino*, 109 N. Y. Supp. 2d 627, affirmed 280 App. Div. 988, 116 N. Y., Supp. 2d 617, where the court held that the interest in the partnership which passed upon the death of a partner was one in personal property, notwithstanding the fact that the partnership owned real property, and therefore the deceased partner's personal representative,

and *not* his heirs, was entitled to require an accounting. In *Claude v. Claude*, 191 Or. 308, 228 P. (2d) 776, 786, the court said:

“Our conclusions above with reference to the disposition of the personal property in the manner indicated are based primarily upon the well known rule that partners do not, as individuals, own any specific part of the firm property. The interest of a partner in the firm assets is the share to which he is entitled after claims against the firm are satisfied and the equities and accounts, as between the partners, adjusted. *Preston v. State Industrial Accident Commission*, supra, 174 Or. at page 564, 149 P. 2d 957; *First National Bank of Eugene v. Williams*, supra, 142 Or. at page 660, 20 P. 2d 222; 68 C. J. S. Partnership, §85, page 525.

“By §79-503, O.C.L.A., Uniform Partnership Law, the nature of a partner’s interest is more succinctly defined as follows: ‘A partner’s interest in the partnership is his share of the profits and surplus, and the same is personal property.’ Such a holding is by the partners in trust for the payment of the partnership debts. In *re Pittock’s Estate*, 102 Or. 47, 52, 201 P. 428; 68 C.J.S., Partnership, §85, page 525. It applies to both real property and personalty. *Adams v. Church*, 42 Or. 270, 70 P. 1037, 59 L.R.A. 782, 95 Am. St. Rep. 740. When a partner is a co-owner with his partners of specific partnership property, he is said to hold it as a tenant in partnership, §79-502, O.C.L.A., Uniform Partnership Law, and the tenancy is known as a tenancy in partnership. *Webber v. Rosenberg*, 318 Mass. 768, 64 N. E. 2d 98.”*

*The only decision of which we are aware that varies in any particular from the foregoing, subsequent to adoption of the Uniform Partnership Act, is the decision of an intermediate appellate court in New Jersey. *Hannold v. Hannold*, 4 N. J. Super. 381, 67 A. (2d) 352. That decision recognized the rule that generally a partner’s interest in the partnership is personal property; but it held that upon the death of a partner, partnership realty descended to the heirs rather than to the personal representative. Even this limited exception to the rule seems to be contrary to the weight of authority. See 7 Uniform Laws Annotated, op. cit.

Not only does the partnership act specifically define the partner's interest to be personal property, but it expressly recognizes the assignability of that interest. Section 27 (R.C.W. §25.04.270) states that a conveyance or assignment does not dissolve the partnership, and that the assignee shall be "entitled" to receive the assigning partner's share of the profits, and, in the event of dissolution, to receive the assigning partner's interest. It reads:

"Assignment of Partner's Interest. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignees, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

"(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners."

The uniform law commissioners' note to the section reads:

"In re the subject of this paragraph [subd. 1] see [George, 153; Beale's Parsons, sections 106, 305, 306; Story, sections 272, 377, 308; Bates, sections 158-168, 931-933; Lindley, 397 et seq., 620; Jas. Parsons, section 175; Collyer, 151, 161; Kent, 59]. These authorities on the whole state that the mere assignment dissolves the partnership. Many such assignments, however, are merely by way of collateral security for

a loan, the assigning partner in no wise intending to end the partnership relation. If he neglects his personal relation the other partners may dissolve the partnership under section 31 of this act. But the mere fact of assignment without more should not be said in all cases to be an act of dissolution. The change in the existing law follows a similar change of the English law embodied in section 31 of the English Partnership Act." [7 *Uniform Laws Annotated*, p. 160.]

The foregoing statutes make clear that the assignment by a partner, of his interest in the partnership, is an assignment of intangible personal property. It is personal property by express definition (R. C. W. §25.04.260). It is intangible by its very nature, in that the individual partner has no right to the possession of specific partnership assets for his own purposes, but only as an agent of the partnership as such (R.C.W. §25.04.250, Uniform Partnership Act §25), and his interest is his share of the profits and surplus (R.C.W. §25.04.260, Uniform Partnership Act §25). R.C.W. §25.04.250 provides:

"Nature of a partner's right in specific partnership property. (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

"(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property *for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.*

(b) *A partner's right in specific partnership property is not assignable* except in connection with the assignment of rights of all the partners in the same property.

(c) *A partner's right in specific partnership property is not subject to attachment or execution*, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) *On the death of a partner, his right in specific partnership property vests in the surviving partner or partners*, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, *has no right to possess the partnership property for any but a partnership purpose.*

(e) A partner's right in specific partnership property is not subject to dower, courtesy, or allowances to widows, heirs, or next of kin. [Italics supplied.]

The individual partner clearly has no right to assign or encumber partnership assets. However, he expressly has the right to assign "his interest in the partnership."

Under these statutes, once a partner has made an assignment *of his interest* in the partnership, there is nothing that his creditors can levy upon with respect thereto. Consequently, the assignment cannot be attacked under Section 70c of the Bankruptcy Act (11 U.S.C. §110c); and where the assignment was made more than four months before bankruptcy, as is the case here, it

cannot be attacked under Section 60a(1) and (2) of the Bankruptcy Act (11 U.S.C. §96a(1) and (2)).

There is no provision in the partnership act requiring any recording or filing of an assignment by a partner of his partnership interest. The courts of the State of Washington have always held (as pointed out in the following subdivision of this brief) that assignments of intangible personal property are effective as against execution creditors, without any filing or recording. Consequently, the assignment by bankrupt to appellant, which was executed and delivered on December 30, 1952, is not subject to attack by respondent trustee in bankruptcy.

C. Under Washington Law, Assignments of Intangible Personal Property Rights are Valid as Against Execution Creditors, with Only Three Exceptions.

The law of the State of Washington, throughout its history, has upheld the validity of assignments of intangible personal property interests. These assignments, whether absolute or for security purposes, have always been held to be effective as against the processes of creditors attempting to levy on the intangible property right. The Washington courts have stated, repeatedly, that the chattel mortgage filing statute and the bill of sale recording statute have no applicability where the property transferred is intangible property. The assignment, when executed, is "so far perfected that no subse-

quent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." Bankruptcy Act, Section 60a(2).

An early decision, which has been frequently cited by the Washington court, is *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128. In that case a water company made an assignment of one-half of its earnings, for security purposes. The assignment was not executed in the form of a chattel mortgage, and was not filed. Thereafter, a creditor of the assignor had a writ of garnishment levied, and the court was met with two questions: the first was whether the assignment was invalid because not in the form of a chattel mortgage and not filed; and the second was whether the specific earnings levied upon were among the one-half of the earnings referred to in the assignment. The court disposed of the questions in that order, and with respect to the first question held that the assignment of earnings need not be in the form of a chattel mortgage nor filed, for the reason "that [the chattel mortgage statute] refers to tangible property which may be taken into possession and not to intangible property, such as accounts and mere things in action which may not be taken into actual possession." Regarding the second question, the court held that the earnings levied upon were not a part of the one-half of the earnings which were assigned, and only on this latter ground held for the garnishment creditor. The court's

decision on the first question has frequently been cited with approval in Washington Supreme Court decisions. It resembles in many respects the problem before us, in that the assignment of the partnership interest, by express statutory provision, carries with it the right to receive the profits to which the assigning partner would otherwise be entitled, and upon dissolution to receive his assignor's interest.

In *Heermans v. Blakeslee* the court cited the earlier case of *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238, which also involved the assignment of intangible property. There, the court had considered the related question whether an absolute assignment (as distinguished from an assignment for security purposes) was valid even though not recorded as a bill of sale. The problems in the two cases were parallel, in that Washington statutes require mortgages of personal property to be filed, and bills of sale to be recorded, where the mortgagee or transferee does not take possession of the property. The court held that the bill of sale statute relates to tangible personal property, and has no applicability to assignments of intangibles. The court said:

“ * * * Our own statute provides (Gen. Stat., §1454), that no bill of sale for the transfer of personal property shall be valid as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless the bill of sale be recorded in the auditor's office in the county in which the property is situated, within ten days after such

sale shall be made. But that section evidently refers to tangible property which may be taken possession of by the buyer, and not to such property as accounts and judgments, mere things in action, which may be assigned but not delivered or possessed according to the common understanding of those terms. The legislature has simply said to buyers of personal property capable of being delivered, either take possession or record your bill of sale within ten days, or your property will be held subject to the claims of creditors and subsequent purchasers. But it has not yet said that no assignment of a chose in action shall be valid as to creditors or innocent purchasers unless recorded or notice thereof be otherwise given to such persons; and, in the absence of such a declaration, we do not think we ought to depart from what we deem the better doctrine, on account of any supposed analogy between ordinary bills of sale and assignments of choses in action." 14 Wash. 180-181; 44 Pac. 155.

In the *Bellingham Bay Boom Co.* case the court also had to decide whether or not giving notice of the assignment to the obligor is essential to validity of the assignment. The assignee in that case did not give notice to the obligor (the Boom Company) until *after* a creditor of the assignor obtained a writ of execution and had a writ of garnishment served on the Boom Company. The Boom Company instituted the interpleader action to ascertain whether the assignee or the execution creditor should prevail. As pointed out above, the assignment was held to be superior to the execution process, and the court held that this was so even though notice of the assignment was not given to the obligor. The court said:

“ * * * It is true that the statute provides that debts and credits are subject to attachment and garnishment (Code Proc., §§300, 305, 306 and 523), but if the debt sought to be garnished is not, at the time, in fact due and owing from the garnishee to the attachment or judgment debtor, it necessarily follows that there is nothing upon which the writ can operate, unless it be true, as some courts have held, that an assignment is of no effect as to third persons until notice thereof is given to the garnishee. The garnisher can get no better right to the debt garnished than his debtor has, and if the latter has no right in or to the debt, the former acquires none by his garnishment.

We think an assignment of a chose in action in good faith and for value, and with no intent to hinder, delay or defraud creditors or subsequent purchasers, is complete and effectual as against third persons, upon its execution and delivery to the assignee and does not acquire any additional force or validity by notice to the debtor.” [Italics supplied] 14 Wash. 177, 44 Pac. 154.

A similar result was given in *Cox v. Bateman*, 139 Wash. 135, 245 Pac. 928, where the court followed the foregoing decision, stating:

“This case on principle is similar to that of *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238, where, after commencing an action to recover for money advanced and labor performed, and prior to judgment, an assignment of the account was made by the plaintiff to a creditor as collateral, the plaintiff continuing the litigation in his own name, as was the case in the present instance. In that case it was held, as against a writ of garnishment subsequently sued out and served, that notice to the debtor of an assignment of a chose in action, before the service of notice of garnishment upon him for a debt of the assignor, is not essential to the protection of the assignee.” 139 Wash. 138-9, 245 Pac. 929.

Although an assignment is valid under Washington law, even without notice, it may be observed that in the case here on appeal there was actual notice to the other partners. Finding of fact IX (R. 35) and testimony of C. F. Stickney (R. 134-5).

In later decisions, the Washington Supreme Court has reaffirmed the rule of *Heermans v. Blakeslee* and of the *Bellingham Bay Boom Co.* case, and has clearly pointed out the distinction between assignments of intangible property and attempted transfers or encumbrances of tangible property. Where the subject of the assignment is crops, timber, a lessee's leasehold interest, and other such tangible property which can be taken into physical possession, the court has held the assignment invalid unless there is compliance with the chattel mortgage statute. However, in rendering such decisions, the court has pointed out that these cases must be distinguished from assignments of interests which are not susceptible of physical possession. One of the cases pointing out the distinction is *Lloyd L. Hughes, Inc. v. Widders*, 187 Wash. 452, 60 P. 2d 243, where the court held that an attempted assignment of tangible property, namely a crop of hops, was invalid for failure to comply with the statute relating to mortgages of crops, but said:

“ * * * If the assignment was of a chose in action, it was not necessary that it be executed and filed as a chattel mortgage, because the statute covering the manner of the execution and filing of chattel mort-

gages refers to tangible property which may be taken into possession. *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128. Where there is an assignment of a lease of real estate, such assignment in order to shut off the rights of creditors, must be executed as a chattel mortgage, because a leasehold interest in real estate is a tangible interest that the assignee may take into his possession. *Farmers State Bank v. Scheel*, 124 Wash. 429, 214 Pac. 825; *First Nat. Bank of Lind v. Farm Loan & Inv. Co.*, 140 Wash. 410, 249 Pac. 983. That rule was applied in the case of *First Guaranty Bank v. Western Cross Arm & Mfg. Co.*, 139 Wash. 614, 247 Pac. 1027, where there was a contract for the sale of standing timber, which was treated as personal property, and the contract had been assigned as collateral security for a loan." 187 Wash. 455-6, 60 Pac. 2d 244.

Other cases involving tangibles susceptible of physical possession are *Farmers State Bank v. Scheel*, 124 Wash. 429, 214 Pac. 825 (leasehold); *Ackerson v. Babcock*, 132 Wash. 435, 232 Pac. 335 (wheat); *First Guaranty Bank v. Western Cross Arm & Mfg. Co.*, 139 Wash. 614, 247 Pac. 1027 (timber); *First Nat. Bank of Lind v. Farm Loan & Inv. Co.*, 140 Wash. 410, 249 Pac. 983 (leasehold); *Lloyd L. Hughes, Inc. v. Widders, supra* (crops).

The partner's interest in the partnership cannot be taken into physical possession. R.C.W. §§25.04.250 and .260, Uniform Partnership Act §§25 and 26. The rights of the partner and of his assignee are intangible, and like the intangibles referred to above, are assignable. R.C.W. §25.04.270, Uniform Partnership Act §27. In the case before us, a valid assignment was executed and delivered

to appellant, and since no subsequent lien by legal or equitable proceedings could become superior to appellant's rights, the assignment is valid as against the trustee in bankruptcy.

There are three exceptions to the general rule that an assignment of an intangible is valid when executed. Since the adoption of the Account Receivable Act in 1947, an assignment of an account receivable is not perfected as against execution creditors until the parties comply with the filing provisions of that Act. That is one of the exceptions to the rule governing intangibles in general. Another exception to the rule is that where the assignee, *by agreement* with the assignor, permits the assignor to collect or receive the proceeds of the assignment *and* use them for his (the assignor's) own purposes, the assignment will not be effective as against execution creditors. This latter exception was established in the case of *Fales Co. v. Seiple Co.*, 171 Wash. 630, 19 P. 2d 118. The third exception arises where the intangible is represented by an instrument which constitutes, in effect, a muniment of title, and endorsement and transfer of possession of the instrument is indispensable for the purpose of transferring the right to the intangible. The common examples of such indispensable instruments are negotiable instruments, certificates for shares of stock, and negotiable warehouse receipts. Where such indispensable instruments are involved, an assignment of the intangible is not perfected as against

creditors until the instrument is endorsed and delivered to the transferee.

It is appellant's position that none of these exceptions has any application to the assignment by a partner of his interest in the partnership. However, since these exceptions were urged by respondent before the referee and the district court, and the first two entered into the rationale of the referee's and district court's decisions, they are reviewed in the following subdivision of this brief.

D. The Three Exceptions to Validity of Assignments under Washington Law Are Not Applicable Here.

1. The statute governing assignments of accounts receivable was passed in 1947. Prior to its adoption, the Washington court had treated assignments of accounts receivable the same as assignments of any other intangibles. For example, in *Heermans v. Blakeslee*, *supra*, the court stated that the chattel mortgaged statute referred to tangible property, and "not to intangible property, *such as* accounts and mere things in action which may not be taken into actual possession." The court's statement in the *Bellingham Bay Boom Co.* case, *supra*, was, "but that section [referring to the bills of sale statute] evidently refers to tangible property which may be taken possession of by the buyer, and not to *such* property as accounts and judgments, mere things in action, which may be assigned but not delivered or possessed according

to the common understanding of those terms.”

Accounts receivable are one species of intangibles, but since 1947 have been subject to separate treatment from other intangibles, by virtue of the Account Receivable Act. R.C.W. §63.16.010 et seq. The immediate question, therefore, is whether an assignment by a partner of his interest in a partnership is an assignment of an account receivable. If the assignment of a partnership interest is not an assignment of an account receivable (and it is appellant's position that it obviously is not), then the assignment is valid under the general rules relating to assignments of intangibles, without complying with the provisions of the Account Receivable Act.

The Act (R.C.W. §§63.16.010) defines account receivable as follows:

“(1) ‘Account’ or ‘account receivable’ means an open book account, mutual account, or account stated, due or to become due, and not represented by a judgment, note, draft, acceptance, or other similar instrument for the payment of money; it includes rights under an unperformed contract written or oral for work, goods, or services which in the regular course will result in an account receivable; it excludes conditional sales contracts.”

To be classed as an “account receivable” under this definition, an intangible must be “an open book account, mutual account, or account stated.” Even if the chose in action does fall within the meaning of one of those terms, it will still be excluded from the definition of account receivable

if it should also be represented by a judgment, note, draft, acceptance or other similar instrument for the payment of money.

A partner's interest in a partnership is certainly not "an open book account, mutual account, or account stated." These terms have a well understood meaning, both commercially and at law. The terms open book account, mutual account and account stated signify the existence of a debt, as distinguished from an investment in a business. The recognition of this distinction in commercial and accounting practice is evident in the manner in which the classification of assets is discussed in a standard and well recognized accounting treatise, the *Accountant's Handbook*, by W. A. Paton. Receivables are discussed in Section 6 of the Handbook. The Handbook does not resort to a list of definitions, but simply discusses the classification of assets, upon the apparent premise that the terms are well understood in commercial and accounting practice. In Section 6, on receivables, there is a discussion of accounts receivable, notes and bills receivable and of various other types of receivables which do not normally come under the heading of account receivable. In Section 7 of the Handbook, there is a discussion of investments, in which are included investments in land, leaseholds, insurance contracts, stocks, bonds, partnerships and the like. It is obvious from the arrangement of the material in the *Accountant's Handbook*, and from the context, that a part-

ner's interest in the partnership is understood to be anything but a receivable, in general, or account receivable, in particular.

There is an equally well recognized distinction at law between an open book account, a mutual account, or account stated, as signifying a debt, on the one hand, and other types of intangible personal property on the other hand. In the article entitled, "Accounts and Accounting," in Volume 1 of *American Jurisprudence*, the terms, book account, mutual account and account stated, are discussed. A definition of the word "account" appears in Section 2 and reads as follows:

"The term 'account,' in its broadest sense, means an unsettled claim or demand based upon a transaction *creating a debtor and creditor relation* between the parties thereto, usually but not necessarily represented by an ex parte record kept by one or both of the parties, but not evidenced by any written obligation." [italics supplied]

Book account is defined in Section 6 as follows:

"§6. *Book Accounts*.—A book account may be defined, generally, as an account based upon transactions *creating a debtor and creditor relation*, evidenced by entries made in a book regularly kept and used for that purpose. A book account is a chose in action, and is property. Book account as a form of action, on an account, is considered in a subsequent section." [italics supplied]

The material in Sections 2 to 6 of the article in *American Jurisprudence* clearly indicate that the terms account re-

ceivable, book account and mutual account do not include all types of choses in action or intangible property rights. In fact, it is clear from these definitions that the law understands these terms in the same sense in which they are generally understood in the commercial and accounting world. Likewise, the definition of account stated, in Section 16 of the above-mentioned article, clearly shows that the term has reference to ordinary debtor-creditor relationships and not to intangible property rights, generally. The definition of account stated in Section 16 is as follows:

“§16. *Generally; Definition, Nature, and Incidents.*—An account stated may be defined, broadly, as an agreement between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other. The amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular constituent items; *it is a liquidated debt*, as binding as if evidenced by a note, bill or bond. * * * ” [italics supplied].

The Courts also recognize the fact that there are rights or choses in action which are not accounts receivable. For example, the Washington Supreme Court has held that sums owing by a shipper to a railroad for unpaid freight charges do not constitute a “mutual, open and current account.” The question before the court involved the application of the Statute of Limitations, and in the case of a “mutual, open and current account” the Statute

begins to run from the date of the last item in the account. However, the court held that there was no "account," in that there was no intention to extend credit, and that the claim was simply on "a contract or liability, express or implied, not in writing," and that thus the Statute of Limitations ran on each item from the date of each shipment. *Chicago, Milwaukee & St. Paul Railway Company v. Frye & Co.*, 109 Wash. 68, 186 Pac. 668. In another case, the Washington Supreme Court considered the meaning of the term "account stated." In *Goodwin v. Northwestern Mutual Life Insurance Co.*, 196 Wash. 391, 83 P. 2d 231, the rights of the parties under a life insurance policy were in dispute, and the appellant contended that the dispute had been resolved by the establishment of an account stated, because appellant had rendered accounts to the insured and he had executed new documents and new loan agreements on the basis of such statements rendered. However, the court refused to hold that sums due or rights accruing under an insurance policy could become the subject of an account or of an account stated; and the court deemed the matter so clear that it simply stated:

"In connection with this portion of appellant's argument, it is sufficient to say that we deem the well known principles of law governing accounts stated inapplicable to such a situation as is presented by this case." 196 Wash. 410, 83 P. 2d 240.

If the rights or choses in action considered in the two

above-mentioned cases were not accounts, or accounts stated, then *a fortiori* the interest of a partner in the partnership is certainly not an account, open book account, mutual account, or account stated.

Analagous decisions have been given by courts in other jurisdictions when they have had to ascertain what constitutes an account receivable. One illustration is the decision in *Black-Clawson Co. v. Evatt*, 139 Ohio St. 100, 38 N. E. (2d) 403, decided in 1941. In that case, the court was considering the applicability of a tax which was levied on "credits," which were defined in the statute as "the excess of the sum of all current accounts receivable and prepaid items . . . over and above the sum of current accounts payable of the business" The court held that the advance payment of all or a portion of the purchase price of goods, when the order is placed, does not give rise to an account payable, as regards the seller, nor an account receivable, as regards the purchaser. Under the same statute, the Ohio Court held in *Chillicothe Paper Co. v. Glander*, 82 N. E. (2d) 413 (decided in 1948) that sums which an employer withholds from employees' wages, as withholding taxes, and which the employer is bound to pay to the United States, are not accounts payable.

The foregoing decisions, involving a variety of factual situations, illustrate the clear and consistent meaning the law gives to the terms, account receivable, book account, mutual account and account stated. There would seem to

be no question that a partner's interest in a partnership is not an account receivable, and an assignment by the partner of that interest is not an assignment of an account receivable and is not governed by the Act relating to assignments of accounts receivable. Consequently, the assignment of this intangible property right is governed by the general rule that the assignment is perfected as against third parties at the time the instrument of assignment is executed. Therefore, it is valid as against the trustee; and the referee's conclusion of law number II (R. 36) declaring the assignment to be "an incomplete pledge of an open book account" is erroneous and should be overruled.

2. Another exception to the general proposition that assignments of intangibles are valid when executed is the rule of *Fales Co. v. Seiple Co.*, supra. In that case it was held that where the assignee, *by agreement* with the assignor, permits the assignor to collect or receive the proceeds of the assignment *and* use them for his own purposes, the assignment will not be effective as against creditors. In the case before us there is no evidence whatever that any such agreement existed, and neither the court or referee made any finding that such an agreement existed. To the contrary, the partnership act expressly states that the assignment "entitles the *assignee* to receive" the profits and the assignor's interest in the partnership. R.C.W. §25.04.270, Uniform Partnership Act §27.

In *Fales Co. v. Seiple Co.*, the court made it abundantly clear that the decision was based upon the fact that there was an express written agreement whereby the assignee permitted assignor to collect the proceeds of the assignment and use them for his own purposes. The president and manager of the assignor was appointed as agent of the assignee to collect the assigned sums, and was authorized in writing to use the sums collected for assignor's own purposes until such time as assignee should demand that collections be turned over to assignee:

"O. H. Seiple, president and manager of the two Seiple corporations, named as the third party in the agreement, was appointed as agent of the Fales company to

" . . . collect all accounts receivable and to apply the proceeds as follows: Out of the first moneys collected third party (O. H. Seiple) shall first pay all accrued interest due. So long as there remain due and owing to second parties (the two Seiple corporations), accounts receivable which are not past due or uncollectible, and 10% in excess of all amounts due first party (the Fales company), and no demand has been made by first party for payment of amounts due, the proceeds collected by third party (O. H. Seiple) may be turned over to second parties (the two Seiple corporations) as their interest may appear and such amounts to be thereupon released from this assignment, provided, however, that all such amounts shall be used by second parties (the two Seiple corporations) in the business of said companies.'

"The assignment agreement was properly executed by all parties." 171 Wash. 635, 19 P. 2d 120.

For eight months the assignee made no demand for the

sums collected. Finally, on December 2, 1930, the assignee made written demand that all collections be turned in to the assignee.

On the basis of the foregoing facts, the court concluded that the assignor did not surrender dominion and control of the subject of the assignment. In setting forth the basis for this rule that dominion and control is not surrendered where there is an agreement permitting assignor to collect and use the proceeds, the court said:

“* * * The accounts receivable were required to be, at all times during the life of the loan, at least ten per cent in excess of the total amount due the respondent. The receivables were *not* to be collected by the respondent assignee. The receivables were to be collected by the president and manager of the two corporations, as agent of the respondent.

“Under the facts as recited above, this was nothing more or less than a collection by the pledgor corporations. Respondent had the right to require—with this condition the defendant corporations complied—out of the moneys collected, payment of the interest accruing monthly on the loans. The contract also provided that, so long as the accounts receivable were ten per cent in excess of the amount due the respondent pledgee, the money collected by the corporations’ president, respondent’s agent, was to be turned over to the defendant corporations [the assignors] for use in the business of the two corporations if ‘no demand has been made by first party (respondent assignee) for payment of amounts due;’ that is, until required by the respondent to do so, the corporations were not required to apply any of the collections—other than the payment of monthly interest—to the repayment of respondent’s loans to the defendant corporations. Other than stated above, there

was no provision requiring the corporations to account in any way to the respondent. * * *

“Until the representative of respondent took charge of the business of the corporations, the assignment was kept secret. Not until that time was notice of the pledge brought home to the debtors of the corporations; and not until that date was there an assertion of dominion by the respondent assignee over the subject matter of the pledge or assignment.

“On facts very little different from the facts in the case at bar, the United States supreme court held, in *Benedict v. Ratner*, 268 U.S. 353, that the arrangement was for the unfettered use by the borrower of the proceeds of the accounts, which precluded the effective creation of a lien and rendered the original assignment fraudulent *in law*.” * * * [italics supplied] 171 Wash. 639-41, 19 P.2d 121-2.

As a basis for concluding that there is no surrender of dominion and control, the Washington court requires a finding of fact that there was an agreement permitting assignor to collect the assigned sums and use them for his own purposes. This is further illustrated by the comparison which the court made of the facts in *Fales Co. v. Seiple Co.* with those in *Benedict v. Ratner*, 268 U.S. 353, 45 S. Ct. 566, 69 L.Ed. 991. In the latter case, the assignor was permitted to collect the sums assigned and use them for his own purposes, until such time as assignee should demand otherwise. As a result the assignment was held to be fraudulent “in law” and void. The United States Supreme Court, to further emphasize that it was basing its decision on a rule of law, arriving at a legal conclusion based upon the facts recited above, stated that it was

using the terms "dominion" and "control" synonymously with the terms "title" and "ownership". The court said:

" * * * A title to an account, good against creditors, may be transferred without notice to the debtor, or record of any kind. But it is not true that the rule stated above and invoked by the receiver is either based upon or delimited by the doctrine of ostensible ownership. It rests not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved. It does not raise a presumption of fraud. It imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien." 268 U.S. 362-3, 69 L. Ed. 998-9.

The court said further:

"* * * There must also be the same distinction as to degrees of dominion. Thus, although an agreement that the assignor of accounts shall collect them and pay the proceeds to the assignee will not invalidate the assignment which it accompanies, the assignment must be deemed fraudulent *in law* if it is agreed that the assignor may use the proceeds as he sees fit.

"In the case at bar, the arrangement for the unfettered use by the company of the proceeds of the accounts precluded the effective creation of a lien, and rendered the original assignment fraudulent *in law*. * * * " [italics supplied] 268 U.S. 364-5, 69 L. Ed. 999.

The Washington supreme court quoted the above portions of the opinion. In *Peterson v. National Discount Corporation*, 179 Wash. 108, 35 P. 2d 1097, the Washington Court reaffirmed the doctrine, and held that where an assignor of accounts receivable was permitted to receive and retain returned merchandise and credit the customers'

accounts therefor, the assignment was void as to third parties.

In the case now before us, there is no evidence, not even a suggestion, that there was any agreement which would have permitted the bankrupt (assignor) either to collect or use for his own purposes the profits which might have become distributable by the partnership, nor any agreement permitting assignor either to collect or use the proceeds of his interest in the partnership upon dissolution. In fact the partnership act provides that the assignee shall be entitled to receive the proceeds. The evidence shows that appellant's properties and funds were kept separate from those of bankrupt, and there was never any commingling of funds. R. 122. Even for such a simple question as whether, in the sale of appellant's securities which furnished the funds for the loan in question, the broker issued a receipt or statement regarding the securities, the bankrupt did not know the answer, and appellant had to volunteer with an answer to the question. R. 109-110. Neither the referee nor the district court was able to make any finding of fact that there was any agreement which would permit bankrupt (the assignor) to collect the proceeds of his interest in the partnership and apply them to his own purposes. In the absence of such findings, there is no foundation for the conclusion that appellant, the assignee, did not acquire dominion and control of the partnership interest. That

conclusion is synonymous with saying that no title or lien was created in assignee, and that the assignment is fraudulent and void *in law*. See *Benedict v. Ratner*, quoted *supra*. There is no foundation in the evidence, or in the findings, for this conclusion of the referee (affirmed by the district court in its memorandum decision, R. 48-50).

A conclusion of law which is not supported by evidence and findings of fact will be overruled; and the conclusion is not converted into a "finding of fact" because the trial court so labels it, where it is in reality a conclusion of law. *Utter v. Eckerson*, CCA-9, 78 F. 2d 307.

"In view of the findings with relation to the source of the moneys deposited by the clerk in the bank, the finding of the court, that these moneys were not public moneys, was a conclusion of law rather than one of fact, and depends upon the interpretation placed upon certain statutes of the United States and of the state of Idaho with relation to the deposit of public money in national banks which we will now consider." 78 F. 2d 308.

For a like ruling, see *Lambert Lumber Company v. Jones Engineering & Construction Co.*, CCA-8, 47 F. 2d 74, where the court said:

"Appellees contend that this is a finding of fact. We think not. The trial court had made a number of specific findings of fact and drew its conclusion as to settlement from these findings. The court in effect states that from the findings of fact the conclusion follows that final settlement occurred prior to March 15, 1925. This seems to us to be clearly a conclusion of law. That a conclusion of law may be placed in the

category of findings of fact does not change the character of the conclusion, and make it something that it is not. * * *’ 47 F. 2d 77.

The conclusion in paragraph X of the findings of fact (R. 35) that “she exercised no dominion or control over any partnership property or any partnership interest of H. E. Kerry” is irrelevant in its reference to partnership property, and not established by any evidence or findings in its reference to the partnership interest, and should be disregarded. The referee and the district court erred in concluding that appellant exercised no dominion or control over the assigned partnership interest (referee, R. 26, 35), or that the partnership interest was not relinquished by bankrupt to appellant (district court, R. 49).

3. The third exception to the general rule that assignments are valid when made arises where the intangible is represented by some instrument, the endorsement and transfer of which is indispensable to the transfer of the intangible property. Common examples of such indispensable instruments are negotiable instruments, certificates for shares of stock, and negotiable warehouse receipts. The Washington courts have frequently held that attempted assignments of intangible property represented by such instruments are not valid as against creditors unless the necessary instrument is endorsed and delivered. *Kietz. vs. Gold Point Mines, Inc.*, 5 Wn. 2d 224, 105 P. 2d 71 (attempted pledge of shares of stock without endorse-

ment and delivery of certificates); *Hastings v. Lincoln Trust Company*, 115 Wash. 492, 197 Pac. 627 (attempted pledge of negotiable warehouse receipt without endorsement); *Qualley v. Snoqualmie Valley Bank*, 136 Wash. 42, 238 Pac. 915 (attempt by a pledgee in possession of a pledged negotiable promissory note and mortgage to repledge it without delivery to the second pledgee).

In the case before us, there is no such negotiable or indispensable instrument of title. There is nothing to take the case out of the usual rule that an assignment of intangible personal property is perfected as against third persons the moment the assignment is made. In fact, it is the law in the State of Washington that such an assignment is effective as against third persons even if it is oral, with no delivery of any written instrument. *Horchover v. Pacific Marine Supply Co.*, 171 Wash. 330, 17 P. 2d 915. The assignee's (appellant's) position in the case before us is even stronger than the position of the successful assignee in the *Horchover* case, because here there was a written assignment delivered to appellant (finding of fact IX, R. 33, 34). As mentioned in earlier portions of this brief, under Washington law, an assignment of intangible personal property is valid as against creditors and third parties even if no notice is given to the obligor. However, in the present case, the appellant's position is further fortified in that there was actual notice to the other

partners (R. 134-5; 35). The assignment was not kept secret.

Since the assignment, under applicable state law, was so far perfected on December 30, 1952, that no creditor could obtain superior rights by legal or equitable proceedings on a simple contract, it is valid as against the trustee, respondent herein, as far as §§60a(1) and (2) and 70c are concerned. The only remaining question is whether any of the technical exceptions of §60a(6) have any effect on the assignment before us.

III.

THE ASSIGNMENT IS NOT AFFECTED BY THE PROVISIONS OF §§60a (6) OF THE BANKRUPTCY ACT.

A. §60a (6) Relates to Certain Types of Equitable Assignments, Whereas the Assignment Here is a Legal Assignment.

Section 60a (6) of the Bankruptcy Act (11 U.S.C., §96a (6)) provides that *equitable* liens will not be deemed perfected if applicable state law “*requires* a signed and delivered writing, or a delivery of possession, or a filing or recording, or other like overt action” as a condition to validity against third persons other than buyers in the ordinary course of business, and if such required steps have not been taken. This subparagraph was aimed at the attempted use of equitable liens “where available means of perfecting legal liens have not been employed.”

Under the decisions of some states, even if the state law required a filing or recording of a bill of sale, or delivery of an indispensable or negotiable instrument as a condition to creation of a legal lien, the courts held that the mere promise to create a legal lien, or the execution of but failure to file the chattel mortgage or bill of sale, created an equitable lien, valid against creditors. Section 60a (6) is designed to strike down such equitable liens where "available means of perfecting legal liens have not been employed."

At the outset, it will be seen that section 60a (6) has no application where, under state law, the transfer or assignment is a *legal* assignment and not an equitable assignment.

The assignment by a partner of his partnership interest is a legal assignment. At one time, an assignment of a chose in action was not recognized in law, but only in equity; and assignments of intangible property were properly denominated "equitable" assignments, and the assignee acquired an equitable ownership. 4 Pomeroy's *Equity Jurisprudence* (Fifth Edition), pp. 787-8, §§1270-1. However, statutes permitting assignees to sue in their own name and combining legal and equitable procedures into one form of action have converted such assignments into legal assignments. 4 Pomeroy, pp. 790-1, §1274:

"§1274. —Interpretation of This Legislation in the Reformed Procedure.—It is the settled interpretation

of this provision in all the commonwealths where the reformed procedure prevails, that whenever a thing in action is assignable, the assignee thereof must sue upon it in his own name; and if the thing in action is itself legal, his right and interest under the assignment have been made legal. The provision itself does not render anything in action assignable; it does not affect in any way the quality of assignability; it simply acts upon things in action which are assignable, and if they are legal in their nature, and if the assignment is one which would have been recognized in a court of law by permitting the assignee to sue in the name of the assignor, then the interest of the assignee is legal."

The State of Washington has the "reformed procedure" spoken of by Pomeroy. R.C.W. §4.04.020 provides that "there shall be but one form of action * * *, to be known as a civil action." R.C.W. §§4.08.010 and 4.08.080 permit the assignee to sue in his own name. The partnership act expressly recognizes an assignment by a partner of his interest in the partnership. R.C.W. §25.04.270. There would seem to be no doubt that the assignment here in question is a legal assignment, and not an equitable assignment. Consequently, in bankruptcy, it is governed by section 60a (2) of the Bankruptcy Act, rather than 60a (6). Since the assignment is valid under state law against execution creditors, it is valid against the trustee under section 60a (2).

B. §60a (6) Is not Applicable because It Affects Only Those Equitable Assignments Where State Law Requires a Filing or Other Overt Act.

In addition to the foregoing considerations, it should be observed that section 60a (6) does *not* affect all equitable assignments, but *only* those where there is failure to comply with state law *requiring* a signed and delivered writing, filing or recording, or the like.

As has been pointed out above, Washington law does not require a written instrument of assignment, an oral assignment being valid against third persons. *Horchover v. Pacific Marine Supply Co.*, supra. Neither does Washington law require a notice as a condition to validity of an assignment. *Bellingham Bay Boom Co. v. Brisbois*; *Heermans v. Blakeslee*; *Cox v. Bateman*, supra. Nevertheless, a written assignment was in fact executed and delivered in this case (finding of fact IX, R. 33, 34), and actual notice was given of the assignment (R. 134-5; finding of fact IX, R. 33, 35). Furthermore, not only does Washington law make no requirement that such an assignment be filed or recorded, it does not even provide any means for filing such an assignment. It is clear that the assignment to appellant does not violate any provision of section 60a (6).

C. If the Intangible Property Assigned Is an Equitable Interest, Then Under §60a (6) an Equitable Assignment is Valid Against the Trustee.

If it should be argued that a partner's interest in the partnership is only an equitable interest (which, would have been true *prior* to the adoption of the partnership act, *Davis v. Alexander*, supra,) then the technical pro-

visions of section 60a(6) will have no application. A provision in the last sentence of §60a(6) reads:

“* * *: Provided, however, That where the debtor's [i.e., bankrupt's] own interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character: * * *.”

Mulhern v. Albin, CCA-8, 163 F. 2d 41, 43; *In re Estes*, 105 F. Supp. 761, 766.

As a result of the foregoing, it seems clear that the assignment of the partnership interest is not affected by section 60a(6). The controlling provisions of the Bankruptcy Act are sections 60a(2) and 70c, which recognize the validity of a transfer (e.g., an assignment), for security or otherwise, which is valid under state law as against creditors of the assignor.

IV.

BANKRUPTCY LAW PROVIDES FOR ABANDONMENT BY THE TRUSTEE OF CLAIMS TO PROPERTY IN WHICH THE ESTATE HAS NO BENEFICIAL INTEREST

It is a well established principle of bankruptcy practice that the trustee should abandon claims to property which are of no value to the estate. This principle is not based upon any specific statutory provision; but it has been deemed self-evident and the courts have followed the practice of approving, and where necessary, requiring, abandonment of assets or claims which are of no value to the estate. 4 *Collier*, pp. 1216-8 expresses the rule as follows:

“* * * The fact that the property may possibly be burdensome does not prevent the title thereto from vesting in the trustee under §70a. And yet, the courts have always recognized that a trustee is under no duty to retain the title to a piece of property or a cause of action that is so heavily encumbered, or so costly in preserving or securing, that it does not promise any benefit to the funds available for distribution. Thus one of the main practical differences here is that in order to free himself of such property the trustee should actually and affirmatively disclaim in every case and cannot rely on the operation of any presumption in favor of disclaimer, as in the case of executory contracts or unexpired leases of real property. * * *

“* * * In the absence of any statutory provision it is therefore judge-made law to which we must look for an answer to the question whether or not a trustee may abandon and disclaim the title to property which by express provision of the law has been transferred to him. The answer is given by a long line of authorities and is too well established to require more than illustrative citation. It is clearly in the affirmative. The trustee (and in a proper case, the receiver before him) may abandon any property which is either worthless, or overburdened, or for any other reason certain not to yield any benefit to the general estate.”

In this case, the court found that the value of the partnership interest in question is \$22,000.00. Finding of fact III, R. 30-1. There is evidence of a disputed matter among the partners which could reduce the value of the partnership interest to \$15,000.00 (R. 132), and for this reason appellant has asserted that the referee erred in finding the value to be \$22,000.00 (Petition for Review, par. 2(a), R. 41; Statement of Points Upon Which Appellant Will Rely, par. 2(a), R. 155). In any event, the *maximum* value of the partnership interest is \$22,000.00.

The loan which the assignment secures is in the sum of \$29,250.00, all of which is a *bona fide* obligation. Finding of fact IV, R. 31. Since the assignment is valid as against creditors, the partnership interest can have no value to the trustee (respondent) and under the well established principle of bankruptcy practice, the trustee should be authorized and directed to abandon any claim thereto.

CONCLUSION

It is respectfully submitted that the assignment to appellant is valid, and the order of the district court should be reversed and the case remanded to the district court for entry of an order overruling the conclusions and the order of the referee, granting the relief prayed for by appellant, and directing the respondent trustee to abandon any claim to the partnership interest referred to herein.

Respectfully,

BOGLE, BOGLE & GATES

ARTHUR G. GRUNKE

For Appellant

APPENDIX A

BANKRUPTCY ACT

Sections 60a, 70a and 70c (11 U.S.C., §§960, 110a and 110c)

“§60. Preferred Creditors. a. (1) A preference is a transfer as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is

not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

(3) The provisions of paragraph (2) shall apply whether or not there are or were creditors who might have obtained such liens upon the property other than real property transferred and whether or not there are or were persons who might have become bona fide purchasers of such real property.

(4) A lien obtainable by legal or equitable proceedings upon a simple contract within the meaning of paragraph (2) is a lien arising in ordinary course of such proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon, or after judgment or decree and whether before or upon levy. It does not include liens which under applicable law are given a special priority over other liens which are prior in time.

(5) A lien obtainable by legal or equitable proceedings could become superior to the rights of a transferee or a purchase could create rights superior to the rights of a transferee within the meaning of paragraph (2), if such consequences would follow only from the lien or purchase itself, or from such lien or purchase followed by any step wholly within the control of the respective lien holder or purchaser, with or without the aid of ministerial action

by public officials. Such a lien could not, however, become so superior and such a purchase could not create such superior rights for the purposes of paragraph (2) through any acts subsequent to the obtaining of such a lien or subsequent to such a purchase which require the agreement or concurrence of any third party or which require any further judicial action, or ruling.

(6) The recognition of equitable liens where available means of perfecting legal liens have not been employed is hereby declared to be contrary to the policy of this section. If a transfer is for security if (A) applicable law requires a signed and delivered writing or a delivery of possession, or a filing or recording, or other like overt action as a condition to its full validity against third persons other than a buyer in the ordinary course of trade claiming through or under the transferor and (B) such overt action has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraph (2). Notwithstanding the first sentence of paragraph (2), it shall not suffice to perfect a transfer which creates an equitable lien such as is described in the first sentence of paragraph (6), that it is made for a valuable consideration and that both parties intend to perfect it and that they take action sufficient to effect a transfer as against liens by legal or equitable proceedings on a simple contract: Provided, however, That where the

debtor's own interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character: And provided further, That nothing in paragraph (6) shall be construed to be contrary to the provisions of paragraph (7).

(7) Any provision in this subdivision a to the contrary notwithstanding if the applicable law requires a transfer of property other than real property for or on account of a new and contemporaneous consideration to be perfected by recording, delivery, or otherwise, in order that no lien described in paragraph (2) could become superior to the rights of the transferee therein, or if the applicable law requires a transfer of real property for such a consideration to be so perfected in order that no bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee, the time of transfer shall be determined by the following rules:

I. Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which recording, delivery, or some other act is required, and compliance therewith is had within such stated period of time; or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days, and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer.

II. Where compliance with the law applicable to the transfer is not had in accordance with the provisions of subparagraph I, the transfer shall be deemed to be made or suffered at the time of compliance therewith, and if such compliance is not had prior to the filing of the petition initiating a proceeding under this Act, such transfer shall be deemed to have been made or suffered immediately before the filing of such petition.

(8) If no such requirement of applicable law specified in paragraph (7) exists, a transfer wholly or in part, for or on account of a new and contemporaneous consideration shall, to the extent of such consideration and interest thereon and the other obligations of the transferor connected therewith, be deemed to be made or suffered at the time of the transfer. A transfer to secure a future loan, if such a loan is actually made, or a transfer which becomes security for a future loan, shall have the same effect as a transfer for or on account of a new and contemporaneous consideration.”

“§70. Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to

his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided*, That in case the trustee, within thrity days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not

vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the

assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

b. * * *

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and

other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such creditor actually exists.”

APPENDIX B

UNIFORM PARTNERSHIP ACT

Section 25-27 (R.C.W. §25.04.250—25.04.270)

“25.04.250 Nature of a partner’s right in specific partnership property. (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner’s right in specific partnership property is

not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner, his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

“25.04.260 Nature of partner's interest in the partnership. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

“25.04.270 Assignment of partners interest. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against

the other partners in the absence of agreement, entitle the assignees, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners."

APPENDIX C

ACCOUNT RECEIVABLE ACT

Section 1 (Definitions) (R.C.W. §63.16.010)

"63.16.010 Definitions. As used in this chapter:

(1) "Account" or "account receivable" means an open book account, mutual account, or account stated, due or to become due, and not represented by a judgment, note, draft, acceptance, or other similar instrument for the payment of money; it includes rights under an unperformed contract written or oral for work, goods, or services which in the regular course will result in an account receivable; it excludes conditional sales contracts.

(2) "Assignment" shall include any transfer, pledge, mortgage or sale of an account.

(3) "Creditor" means a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

(4) "Debt" means the indebtedness owing on an account.

(5) "Debtor" means any person by whom an account is owing to the assignor.

(6) "Filing officer" means the secretary of state."

In The United States
COURT OF APPEALS
For the Ninth Circuit

RUTH B. KERRY,

Appellant,

vs.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy of
Harold Edwin Kerry and the community of Harold
Edwin Kerry and Ruth B. Kerry, his wife, Bankrupt.

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLEE

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No. 14533

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Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

BRIEF FOR THE APPELLEE

QUESTION PRESENTED

Should the Court grant appellant's petition to require appellee, as trustee in bankruptcy, to abandon bankrupt's right, title and interest in a partnership and allow appellant to foreclose a purported pledge thereof, upon a showing that nine months prior to the institution of bankruptcy proceeding bankrupt signed an instrument stating that he as-

signed to appellant his right, title and interest in the partnership as security until a note was paid in full, when bankrupt continued in full control of the partnership until bankruptcy; when nothing but the purported pledge agreement was delivered into the dominion and control of appellant; and when said agreement or notice thereof was not filed?

STATEMENT OF THE CASE

Both appellant and appellee are seeking the bankrupt's rights in the winding up of the West Tenino Lumber Company. This firm was a partnership consisting of the bankrupt and three other partners (R. 87-88). After payment of partnership creditors, bankrupt's portion represents a 45/88th interest (R. 90) in a remilling plant which buys lumber for the purpose of resawing and finishing (R. 102). Bankrupt's interest had a book value of \$23,482.25 on November 31, 1953 (R. 10-11), a book value of \$23,785.00 on March 18th, 1954 (R. 103) and a market value of \$21,917.00 on March 18, 1954 (R. 104). At all times between December 30, 1952, and the time of filing the petition in bankruptcy, the bankrupt's interest in the surplus of the partnership had a value of more than \$10,000.00 (R. 131).

Appellant's claim to bankrupt's rights upon distribution of assets is based upon the following instrument signed by her husband:

"ASSIGNMENT

H. E. Kerry does hereby assign and set over to Ruth B. Kerry, all of his right, title and interest in and to the partnership known as West Tenino Lumber Com-

pany which is a partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico. Said assignment is substituted security for that certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28, 1952, and which security is to act as continuing security for that certain note dated July 28, 1952, until said note is paid in full.

Dated this 30th day of December, 1952.

/s/ H. E. KERRY”

which will be referred to as Exhibit 9 (R. 100).

The Referee in Bankruptcy concluded that Exhibit 9 is an incomplete pledge (R. 36). He found that appellant exercised no dominion or control over any partnership interest of the bankrupt (R. 35).

The appellant did not claim that the Referee erred in this finding when she made her petition for review before the District Court (R. 40 through 45).

The District Judge, in his memorandum decision said:

“The ‘assignment’ dated December 30, 1952, in fact is not an assignment but by its term purports to be a pledge of the bankrupt’s partnership interest in West Tenino Lumber Company to secure indebtedness referred to in the document. Such character of the document was recognized by the parties in the hearing before the Referee (Tr. 34) and acknowledged by petitioner’s counsel at the argument in this Court.” (R. 48).

and

“From the record and the unchallenged facts found by the Referee it is clear that the partnership interest of the bankrupt was not relinquished by the bankrupt

or delivered to Mrs. Kerry. Accordingly, no valid pledge was completed under Washington law.

"The foregoing view of the matter makes it unnecessary to consider whether an incompleated pledge of a partnership interest is within the Washington definitions of either chattel mortgage or accounts receivable." (R. 49-50).

It was shown at the hearing before the Referee that on July 28, 1952, the bankrupt pledged two certificates of capital stock of the West Tenino Lumber Company, a Washington corporation, to secure a promissory note payable to appellant in the sum of \$29,250.00 and maturing July 28, 1957 (R. 73-74-75). On December 30, 1952, appellant authorized bankrupt to vote the stock for the dissolution of the corporation and to form a partnership to be known as the West Tenino Lumber Company (R. 81-82). The trustee in liquidation of West Tenino Lumber Company, a Washington corporation, executed a bill of sale dated December 30, 1952, selling and transferring a 45/88th of all of the assets of the corporation to bankrupt (R. 94-95-96). The property consisted of a lessee's interest in a lease from the Northern Pacific Railway Company and other assets (R. 94-95-96). The bill of sale transferred a 23/88ths interest to Israel Torrico, a 17/88th interest to Charles L. Stickney and a 3/88ths interest to H. A. Preszler (R. 94). The bill of sale was filed on the same day with the Auditor of the county where the property was located (R. 96-97).

On the same day bankrupt signed Exhibit 9 (R. 100) and bankrupt, Charles L. Stickney, Israel Torrico and H. C.

Preszler signed an agreement forming the West Tenino Lumber Company partnership (R. 87 through 94) as had been directed and authorized by appellant (R. 81-82).

The partnership agreement provided that the capital of the partnership should consist of the assets which were transferred to the partners in the above bill of sale (R. 89), and bankrupt should own 45/88ths of the capital (R. 90). It also provided that bankrupt was to share 45/88ths in the net income, net losses and capital gains and losses of the partnership (R. 90). Withdrawals of profits were to be made by the partners at such time and in such amount as would be agreed (R. 91). Bankrupt was to act as managing partner with the right to delegate such duties as he may see fit (R. 91). Upon death of a partner during the term of the partnership, a corporation was to be formed and the estate of the deceased partner was to accept the proportionate share of capital stock of the corporation as complete settlement of his capital account in the partnership. The assets of the partnership were to be transferred to the corporation and all of the common stock of the corporation was to be distributed to the partners, including the estate of the deceased partner in proportion in which the capital in the partnership is owned by the partners (R. 92). Nothing was mentioned concerning distribution of profits or assets upon dissolution to appellant. It was agreed that the partners could alter any paragraph, clause, matter or thing in the partnership agreement (R. 93).

A certificate of firm name was filed on December 31,

1952, with the Clerk of the county where the business was conducted, stating that bankrupt, Charles L. Stickney, Israel Torrico, H. A. Preszler are all of the persons having an interest in the West Tenino Lumber Company (R. 97, 98, 99, 100). No certificate was filed showing that appellant had an interest in the partnership (R. 111-112).

Bankrupt, as manager of the partnership, had control of the use and distribution of the income of the partnership (R. 116). This income included \$5,920.21 earnings in 1953 of which \$3,027.60 was the earnings of bankrupt's interest (R. 10-11). Bankrupt, as manager, had controlling say in connection with the affairs of the partnership (R. 113).

Appellant had nothing to do with the partnership (R. 112). When appellee's counsel was foolish enough to open the door by asking appellant's husband what was delivered to his wife in the way of a pledge, appellant's counsel objected (R. 112). The question was not answered during the hearing.

Mrs. Kerry's name did not appear as having an insurable interest in any of the insurance policies on the property of the partnership (R. 116). In fact, her husband testified that as he understood the transaction she had no interest in the partnership (R. 112) despite the fact that there were profits (R. 10-11-116) and at all times after the formation of the partnership there was a surplus (R. 131).

Mrs. Kerry's name did not appear any place on the books and records of the company nor was any instrument filed with the company showing an assignment to her (R. 131).

It was stipulated by counsel that notice of execution of Exhibit 9 was not filed with the Secretary of State (R. 143).

SUMMARY OF ARGUMENT

Appellant's petition to have trustee abandon burdensome asset and permit her to foreclose pledge should not be granted because:

I. Section 60a of the Bankruptcy Act (11 U.S.C. §96a) defines preferences which will be set aside when made within four months before filing the petition initiating the bankruptcy proceeding and subsection (7) thereof provides that liens will be deemed made immediately before the petition initiating the bankruptcy proceeding, and thereby within four months thereof, if applicable state law requires recording, delivery or some other act that no lien obtainable by legal or equitable proceedings could become superior and compliance with the applicable state law is not had.

II. Applicable state law requires that the transaction upon which appellant relies for relief be perfected as one of the following:

A. A pledge

B. A chattel mortgage

C. A pledge or mortgage of an account

III. The transaction upon which appellant relies for relief was not perfected as:

A. A pledge because of absence of delivery and dominion in purported pledgee.

B. A chattel mortgage because of failure to properly

execute and file Exhibit 9.

C. A pledge or mortgage of an account because of failure to file notice thereof with the Secretary of State.

I. VOIDABLE PREFERENCES AND TITLE OF TRUSTEE IN BANKRUPTCY.

Section 60a of the Bankruptcy Act (11 U.S.C. §96a) defines preferences which will be set aside when made within four months before filing the petition initiating the bankruptcy proceeding and subsection (7) thereof which provides that liens will be deemed made immediately before the petition initiating the bankruptcy proceeding, and therefore within four months thereof, if applicable state law requires recording, delivery or some other act so that no other lien obtainable by legal or equitable proceedings could become superior and compliance with such applicable state law is not had. The text of subsection (7) is in the appendix.

Applicable portion of section 70c is as follows:

“The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such creditor actually exists.” (11 U.S.C., §110c.

II. Applicable state law requires that the transaction

upon which appellant relies for relief be perfected as a pledge, a chattel mortgage or a pledge or mortgage of an account.

In order to discuss applicable state law concerning requirements to perfect the purported lien upon which appellant relies, the transaction should be traced from the time of execution of Exhibit 9 until the hearing before the Referee in Bankruptcy.

By bill of sale filed December 30, 1952, bankrupt and others become the owners of an undivided interest in a lease from the Northern Pacific Railway Company together with other assets formerly owned by the West Tenino Lumber Company, a Washington corporation (R. 94-95-96). The other assets included a lumber remilling plant and necessary equipment that goes with it (R. 102).

On the same day the West Tenino Lumber Company partnership was formed by the owners of the undivided interests set forth in the bill of sale (R. 87 and 88). The capital of the partnership consisted of the assets which had been transferred to the partners by bill of sale (R. 89 and 90). Each partner owned capital in the partnership in proportion to the undivided interest he owned in the property (R. 90). Net income, net losses and capital gains and losses were to be shared by the partners in the same proportion (R. 90). Upon dissolution due to death of a partner, a corporation was to be formed and bankrupt or his estate was to get stock for his interest in the partnership. Exhibit 9 purportedly encumbering all of bankrupt's right, title and

interest in and to the partnership was signed on the same day (R. 100).

The security described in Exhibit 9 included bankrupt's three interests arising from the partnership.

R.C.W. 25.04.240 provides:

“Extent of property rights of a partner. — The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.”

Despite the fact that the statute distinguishes a partner's rights from his interest, all were described in Exhibit 9 (R. 100).

Although Exhibit 9 (R. 100) and the partnership agreement (R. 87-94) are separate and independent instruments, both were signed simultaneously (R. 32-33). It was within the power of appellant, bankrupt and his partners to include in the partnership agreement provisions recognizing that appellant was the owner of the property contributed as capital by bankrupt or that the 45/88th interest in the property was encumbered to secure the payment of the note described in Exhibit 9.

Bankrupt could not contribute an unencumbered 45/88th interest in the property as capital in the partnership and simultaneously place an encumbrance on the property for appellant's benefit. The property was operated by the partnership independent of any control by the appellant (R. 112-113-114).

Obviously appellant failed to acquire title to or an encumbrance on this first partnership right of bankrupt.

The other right purportedly included in Exhibit 9 was the right to participate in management (R.C.W. 25.04.240 (3)). This right was given to bankrupt in the partnership agreement (R. 91). Appellant took no active interest in and had nothing to do with the partnership (R. 112-113). Obviously appellant failed to acquire this right described in Exhibit 9 (R. 100).

The other property right of a partner is his interest in the partnership R.C.W. 25.04.240 (2) defined as his share of the profits and surplus. R.C.W. 25.04.260.

The bill of sale became effective as of the close of business on December 30, 1952. It follows that on the day of execution of Exhibit 9, no profits were involved. At that time the remilling plant and the lease from the Northern Pacific Railway Company were the only assets of the partnership. On December 30th, 1952, bankrupt's interest in the surplus could only arise out of his ownership of a 45/88th interest in the lease and remilling plant. The division of the property rights of a partner into rights and interests is a convenient device to preserve the uninterrupted continuity of the firm during the partnership tenancy.

R.C.W. 25.04.250 provides that a partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

The incidents of this tenancy are such that during the term of the partnership the property is to be used for part-

nership purposes unless all partners consent.

The preservation of continuity in the partnership through this device does not divorce a partner's interest from his right in specific partnership property and his right to participate in management. Surplus and profits are dependent upon partnership property and management. To control partnership property and management is to control partnership profits and surplus.

Surplus is what is left of partnership assets or property after partnership liabilities are provided for.

Bankrupt testified as appellant's witness, as follows:

"No, I don't think so. She had no interest in the - - in the West Tenino Lumber Company as such as I understand the transaction. She was the pledgee of my interest" (R. 112).

The testimony of appellant's witness that she had no interest in the partnership was not modified, altered or explained. This, together with the testimony concerning the acts of the parties placing the bankrupt in full dominion and control of everything connected with the partnership was substantial evidence supporting the Referee's finding that appellant exercised no dominion or control over any partnership interest of bankrupt (R. 35).

The appellant seeks to foreclose her purported pledge and thereby acquire bankrupt's rights upon distribution of assets in the winding up of the West Tenino Lumber Company. If successful she will get an undivided interest in the remilling plant after partnership creditors are paid. At all

times relevant to this proceeding, dominion and control of this plant was centered in bankrupt. As managing partner, he had the right to manage the partnership and to delegate such duties as he saw fit (R. 91 and 113). Appellant had nothing to do with partnership property or management (R. 112-113).

The dependence of surplus and profits upon management and partnership property can be illustrated by examining the partnership balance sheet dated November 31, 1953 (R. 10-11). On that date bankrupt's interest had a book value of \$23,482.25. This book value represented bankrupt's undivided interest in the assets after provision was made for payment of partnership liabilities. During the first eleven months of 1953 the partnership earned \$5,920.21 of which \$3,027.60 represented bankrupt's share of the profits. From day to day, week to week, and month to month as there were partnership profits or losses the interest of the bankrupt changed. This change could only take place as partnership assets or liabilities increased or decreased. This took place as a result of management or property values.

I have pointed out that during the period of the partnership tenancy the bankrupt's ownership and interest was subject to certain restrictions, to preserve partnership continuity. The property was to be used solely for partnership purposes (R.C.W. 25.04.250 (2) (a)). This necessarily cut off bankrupt's power to assign or dispose of his right to possess or use partnership property during the period of tenan-

cy (R.C.W. 25.04.250 (2) (b)). The restriction that during the tenancy the property was to be used solely for partnership purposes did not cut off bankrupt's right to assign, mortgage, or encumber his interest (R.C.W. 25.04.270 and R.C.W. 25.04.020). There is no provision in the uniform partnership act (R.C.W. 25.04.010) indicating an intention to change or repeal the requirements of the state law concerning delivery of possession, filing or other like overt act in order to perfect such assignment, mortgage or encumbrance as against third persons. As to creditors, this statute does not validate an otherwise void mortgage or encumbrance. The statute does not repeal the requirement of an acknowledgment, an affidavit of good faith and filing to perfect a chattel mortgage or the requirement of delivery of dominion and control to pledgee to perfect a pledge.

When such conveyance is legally executed it does not dissolve the tenacy in partnership. If a true assignment is involved, as to other partners, the assignee is entitled to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled (R.C.W. 25.04.270 (1)). After an assignment has been properly executed, assignee is entitled to receive assignor's interest after dissolution. The word assignee rather than the term recipient of the conveyance is used in connection with rights to profits and interest after dissolution in the above two sub-sections because a mortgagee or holder of an encumbrance was not intended to be included. A mortgagee or holder of an encumbrance would not be entitled to the

property until foreclosure. In addition a holder of a mortgage or encumbrance of nominal value would not be entitled to receive a partnership interest of substantial value.

The above two sub-sections define the rights of the parties included in the assignment "as against the other partners" and not as to creditors of individual partners.

Creditors of the bankrupt could reach his interest in the partnership by means of a charging order (R.C.W. 25.04.-280) rather than by attachment or execution (R.C.W. 25.04.250 (2) (c)). A judgment creditor could reach his interest through the appointment of a receiver (R.C.W. 25.04.280 (1)) or by foreclosure. (R.C.W. 25.04.280 (2)).

It would not be of considerable assistance to label bankrupt's right, title and interest in the partnership described in Exhibit 9 as tangible or intangible property and then jump to a conclusion as to whether immediately before the petition initiating the bankruptcy a creditor with a charging order or appellant would have superior rights. Consideration of the reason for requiring delivery of possession, filing or like overt act to effect a valid lien as to creditors and an examination of the facts in Washington cases dealing with the rights of holders of secret liens should help to reach a proper conclusion.

The tendency to invalidate secret liens has been increasing to protect creditors who may have extended credit upon the strength of apparent unencumbered ownership when means of legal notification are available.

Parties extending credit to bankrupt saw that he had do-

minion and control of the partnership (R. 91 and 113). It is a common practice to obtain credit information from commercial, trade or credit reporting agencies before giving credit. Examination of the records in the office of the Clerk of the county where the partnership operated its business revealed that bankrupt, Stickney, Torrico and Preszler were the only persons having an interest in the partnership (R. 97 through 100). Records of the County Auditor showed that the bankrupt owned an undivided 45/88ths of the partnership property. Exhibit 9 was not filed or recorded (R. 131 and 143). In fact, appellant's purported lien was so secret that her name did not appear on partnership books (R. 131).

In order to protect her secret lien, appellant relies upon the dicta of *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128, to the effect that the chattel mortgage statute refers to tangible property. The Supreme Court nullified this dicta by construing questionable cases as involving tangible property and by construing security assignments of intangibles as pledges.

Ackerson v. Babcock, 132 Wash. 435, 232 Pac. 335. Assignment of landlord's interest in lease as security construed as chattel mortgage and void as to attaching creditor, due to failure to execute and file assignment as required by chattel mortgage statute. Case involved right to rent payable after signing of the assignment.

Farmers State Bank v. Scheel, 124 Wash. 429, 214 Pac. 825. Security assignment of lessee's interest in lease con-

strued as a chattel mortgage. The parties were seeking money due lessee because of summer fallow of land. Security assignment executed several months before money due. Court held security assignment not valid because not properly executed as a chattel mortgage.

Lloyd L. Hughes, Inc. v. Widders, 187 Wash. 452, 60 P. (2d) 243. Security assignment of money to become due on hop contracts in connection with crops to be delivered in the future. Held not the assignment of a mere chose in action and to be valid security assignment must be executed a chattel mortgage.

Peterson v. National Discount Corporation, 179 Wash. 108, 35 P. (2d) 1097. Security assignment of trade accounts held to be a pledge and invalid as to creditors due to dominion retained in pledgor.

Fales Co. v. Seiple Co., 171 Wash. 630, 19 P. (2d) 118. Security assignment of trade accounts held to be a pledge and that pledgee must obtain dominion of account to be valid as to creditors. The Court pointed out that the discussion of chattel mortgages in *Heermans v. Blakeslee* was not necessary for its decision.

First National Bank v. Farm Loan & Invest. Co. 140 Wash. 410, 249 Pac. 983. Assignment by tenant of his lease as collateral security held to be a chattel mortgage. Assignment made October 30, 1923. By terms of lease tenant was to be paid for all land fallowed during summer of 1924, at the rate of \$3.50 per acre. Suit brought by assignee to recover money for land summer fallowed in 1924. Court said

had the assignment been absolute, a different question would be presented.

No case since *Heermans v. Blakeslee* has held that the property involved was intangible and therefore not the subject matter for a chattel mortgage.

Ackerson v. Babcock, 132 Wash. 435, 232 Pac. 335, decided that a security assignment must be executed as a chattel mortgage or a pledge to be valid as to creditors.

II. A. — A PLEDGE:

Appellant tried this case before the Referee in Bankruptcy upon the theory that the security involved in Exhibit 9 had been pledged (R. 3-4-5-6-52-61-105-112). The case was decided by the Referee on the theory that a pledge was involved (R. 26-36), and that the pledgee was not placed in dominion or control of the property which was purported to act as security (R. 35).

Appellant presented his appeal to the District Court on the theory that a pledge was involved (R. 48). The Judge decided that the pledge was not valid as to the trustee because from the record and the unchallenged facts found by the Referee it is clear that the partnership interest of the bankrupt was not relinquished by the bankrupt or delivered to Mrs. Kerry (R. 49).

Ackerson v. Babcock, 132 Wash. 435, 232 Pac. 335, and this case involved many of the same legal problems. There a landlord assigned his lease to secure the payment of a promissory note. Rent reserved in the lease was to be a share of the wheat to be grown on the land in the future.

The tenant harvested the wheat and placed it in a warehouse. The warehouseman was notified to receive the wheat in the name of the assignee for security, but a creditor of the landlord attached the wheat before warehouse receipts were issued.

The court said that the security assignment was not executed in compliance with the chattel mortgage statute requiring an acknowledgment, an affidavit of good faith and filing and therefore did not perfect a lien on the wheat as to the attaching creditor of assignor.

The court then said the question was whether there was such delivery of the wheat to the assignee for security as would constitute a valid pledge.

The property purportedly encumbered by the security assignment of a lease was personal property (wheat to be raised) which assignor would be entitled to receive in the future. The amount of wheat to be received was to be one-third of the crop. The number of bushels of wheat was unknown at the time of the assignment and was dependent upon the success or failure of the crop. The lease itself created a tenancy. The landlord assignor did not have the right to possess the land or the wheat until a date after the signing of the assignment. The security assignment did not give the assignee possession, dominion or control of the wheat.

Now that the West Tenino Lumber Company partnership has been dissolved by the bankruptcy of H. E. Kerry, the victor in this law suit will receive a 45/88th interest in a remilling plant after partnership creditors are provided

for. If the plant is sold in the process of winding up the partnership, a sum of money will be the subject matter of this litigation. This latter contingency will be discussed with *Farmers State Bank v. Scheel*, 124 Wash. 429, 214 Pac. 825, *First National Bank v. Farm Loan & Invest. Co.* 140 Wash. 410, 249 Pac. 983 and R.C.W. 63.16.010 et seq.

In *Peterson v. National Discount Corporation*, 179 Wash. 108, 35 P. (2d) 1097, an assignee of trade accounts took the position that it became the owner of trade accounts through the assignment in question. It was pointed out that the payment of interest and finance charges by the assignor is inconsistent with a sale. The purported assignment was held to be a pledge, void as against creditors of the assignor.

In *Fales Co. v. Seiple Co.* 171 Wash. 630, 19 P. (2d) 118, construed a written assignment of trade accounts given to secure an indebtedness as an incompleated pledge and void as to creditors.

In *Kietz v. Gold Point Mines, Inc.* 5 Wash. (2d) 224, 105 P. (2d) 71, the court stated that a written instrument which purportedly used shares of stock as security was an attempted pledge and void because the certificates remained in the possession of the officers of the corporation.

II. B — A MORTGAGE:

The Uniform Partnership Act recognizes that a partner's interest may be mortgaged.

“A conveyance by a partner of his interest in the partnership” (R.C.W. 25.04.270)

“Conveyance includes every mortgage

. . . ” (R.C.W. 25.04.020)

Appellant's statement on page 39 of his brief that W. A. Paton in his Accountant's Handbook classifies leaseholds and partnerships in the same section, is in point as to the nature of bankrupt's interest.

Ackerson v. Babcock, 132 Wash. 435, 232 Pac. 335, held that a security assignment by a landlord of his lease must be executed in accordance with the chattel mortgage statute.

The words personal property in the Chattel Mortgage Statute (R.C.W. 61.04.010) should be construed to mean the same thing as the words personal property in the Uniform Partnership Act (R.C.W. 25.04.260).

“Mortgages may be made upon all kinds of personal property . . . ” (R.C.W. 61.04.010).

“A partner's interest in the partnership is his share of the profits and surplus and is personal property.” (R.C.W. 25.04.260).

II. C. — A PLEDGE OR MORTGAGE OF AN ACCOUNT:

R.C.W. 63.16.010 et seq requires that notice of any transfer, pledge, mortgage or sale of an open book account, mutual account, or account stated must be filed with the secretary of state to be effective as to creditors.

I have pointed out that the dicta of *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128, to the effect that a trade account is intangible personal property and not the proper subject matter for a chattel mortgage is out of step with

later decisions, and now the legislature recognizes that broadly speaking all accounts may be mortgaged.

Appellant has taken the position that the security described in Exhibit 9 is an intangible and of the nature of the trade account discussed in *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128, and for that reason is not the proper subject matter for a chattel mortgage. If the security mentioned in Exhibit 9 (R. 100) is an intangible comparable to a trade account, then appellant's failure to file notice of the assignment as required in R.C.W. 63.16.010 et seq makes her claim of ownership or lien inferior to the rights of a creditor at the time of filing the petition initiating the bankruptcy.

Record of bankrupt's interest in the partnership was kept in the partnership books. These books were kept open during the continuation of the partnership and will be kept open until the partners or their successors agree upon an account winding up the affairs of the West Tenino Lumber Company. The open book account will then become an account stated, *George v. Shepard*, 117 Colo. 135, 184 P. (2d) 473.

In this accounting the remilling plant and other personal property will be listed as assets. Liabilities will rank first amounts owing creditors other than partners, and second amounts owing partners (R.C.W. 25.04.400). If the remilling plant is sold and money is distributed an account will be owing the victor in this litigation.

III. A. THE TRANSACTION UPON WHICH AP-

PELLANT RELIES FOR RELIEF WAS NOT PERFECTED AS A PLEDGE BECAUSE OF ABSENCE OF DELIVERY AND DOMINION IN PURPORTED PLEDGEE:

It has been pointed out that a trade account by dicta first was said not to be proper security under the chattel mortgage statute and later a security assignment of such an account was held to be a pledge. The pledge theory was adopted by the courts as a result of a growing tendency to avoid secret liens.

In *Fales Co. v. Seiple Co.*, 171 Wash. 630, 19 P. (2d) 118, an assignment was made using the following language:

"... do hereby sell, transfer and assign to first party (Fales Company) all of the accounts receivable ... as security in the manner and to the extent herein provided." 171 Wash. 633 and 644, 19 P (2d) 119.

The court said:

"The assignment was invalid as to the rights of third parties, inasmuch as there was no surrender by the assignor of dominion and control of the subject matter of the assignment, and assumption of dominion and control of that subject matter by the assignee. There is no showing of actual intent on the part of the respondent to defraud the creditors of the two defendant corporations; however, as to third parties the assignment was invalid in law." 171 Wash. 639, 19 P (2d) 121.

In *Peterson v. National Discount Corporation*, 179 Wash. 108; 35 P. (2d) 1097, the court said:

"Three questions are presented by the appeal: (1)

Did the transactions between the insolvent corporation and the appellant amount to sales of the accounts receivable, as counsel for appellant contend, or did the transactions constitute assignments of the accounts receivable as security for payment of loans of money? (2) If the accounts receivable were assigned to secure payment of loans, was there such retention of dominion by the assignor over the pledged accounts as invalidated the assignments, under the statute, Rem. Rev. Stat., Sec. 5831-2 (P.C. Sec. 4532-2), and under the rule enunciated in *Fales Co. v. Seiple Co.*, 171 Wash. 630, 19 P. (2d) 118, and in *Benedict v. Ratner*, 168 U.S. 353, 45 S. Ct. 566. (3) Was appellant lender entitled to credit for money advanced to the insolvent borrower during the period of four months immediately preceding the receivership?" 179 Wash. 113 and 114, 35 P. (2d) 1100.

The assignment used the words "sells, assigns and sets over" to the assignee all its right, title and interest in and to accounts receivable listed.

The court said that the position of the assignee that the accounts were sold, is not tenable and held that there was a pledge because the accounts were assigned to secure the payment of loans.

The court added:

"The assignor was permitted, with the knowledge of the appellant assignee, to allow credits to debtors upon assigned accounts for merchandise returned, and was also permitted to make adjustments and allow other credits. That, alone, constituted an exercise by the assignor grinding company of such dominion over

the assigned accounts as invalidates the assignments, under the doctrine of *Benedict v. Ratner*, supra, and *Fales Co. v. Seiple Co.*, supra." 179 Wash. 117, 35 P (2d) 1101.

During the tenancy in partnership, the bankrupt and his partners had dominion and control of partnership property, profits and surplus. Without consent or approval of the appellant they could hold, sell, lease, transfer or exchange the plant. They could conserve, speculate or dissipate the assets. Their dominion was limited only by their ingenuity, energy, desire and the laws which govern business enterprise. This dominion and control was centered in the bankrupt as managing partner (R. 91). His policy determined increases or decreases in profits and surplus. The partners determined if and when profits would be distributed. They had power to amend the partnership agreement (R. 93) and extend the period of the partnership tenancy indefinitely. Their power was unlimited as to partnership profits and surplus. The Referee found that appellant exercised no dominion or control over the partnership interest of the bankrupt. This finding is an ultimate fact. It required no finding as to the evidence behind it. There was no evidence presented showing such dominion and control in appellant.

In *Peterson v. National Discount Corporation*, 179 Wash. 108, 35 P. (2d) 1097, only a small percentage of the accounts pledged involved credits for merchandise returned or other adjustments. Despite this fact all accounts purportedly pledged were turned over to the receiver. Exhibit 9

included all of bankrupt's right, title and interest in the partnership. If a part described in the pledge is invalid, the whole pledge must fall.

Bankrupt had controlling say in the partnership (R. 113). Certainly his dominion and control was more complete than that of the pledgor in the *Peterson* case. In fact, appellant didn't know what assets would be included in profits, if any, and surplus until the partnership was wound up. Her dominion and control of anything connected with the partnership until bankruptcy was nil.

In *Hastings v. Lincoln Trust Company*, 115 Wash. 492, 197 Pac. 627, the court distinguishes transactions which may be valid as between the parties but void as to creditors, and then said:

"It is elementary law that the delivery of pledged property by the pledgor to the pledgee is absolutely necessary to the life of the contemplated pledge. It is well said in *Security Warehousing Co. v. Hand*, 143 Fed. 32 (41):

"Delivery of possession is the very life of a pledge. No mere agreements respecting possession can create it. The contract of pledge cannot exist outside of the fact of change of possession." 21 R.C.L. 643.

"It is of course not necessary, under all circumstances, that the delivery be an actual physical movement of the property from the hands or control of the pledgor to the pledgee; but it must in any event be of such nature that the control and dominion of the pledge passes from the pledgor into the absolute control and dominion of the pledgee." 115 Wash. 499 and 500, 197 Pac. 629.

In *Kietz v. Gold Point Mines, Inc.*, 5 Wn. (2d) 224; 105 P. (2d) 71, the court considered an assignment purportedly pledging shares of capital stock of a corporation. The court decided that the execution of the assignment purporting to pledge the stock was not delivery of the subject matter of the pledge. The certificates of stock were held by the issuing corporation. The court held that the corporation was not chosen by pledgor and pledgee to hold the certificates for pledgee, nor did the corporation agree to hold the certificates for the pledgee and therefore the issuing corporation was not holding the certificates for the pledgee.

The court said:

“In passing upon the question of necessity of delivery of personal property to complete a pledge, this court stated in *Kuhn v. Groll*, 118 Wash. 285, 203 Pac. 44:

“It is true that the law requires a delivery of the pledged property from the pledgor to the pledgee and a retention of it by the pledgee in order to make the pledge fully effectual as security. We think the law applicable to the situation we find here is well stated in 21 R.C.L. 643, as follows:

“The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception, for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. If, however, the pledgee has the thing already in his possession, the very contract transfers to him, by operation of law, a virtual possession thereof as a pledge the moment the contract is completed.” 5 Wn. (2d) 229, 230; 105 P.

(2d) 74.

There is no evidence that the bankrupt or the other partners were holding anything connected with the partnership for appellant. As pointed out in the last case discussed, they were not chosen to hold anything for appellant nor did they agree to hold anything for her.

III. B. THE TRANSACTION UPON WHICH APPELLANT RELIES FOR RELIEF WAS NOT PERFECTED AS A CHATTEL MORTGAGE BECAUSE OF FAILURE TO PROPERLY EXECUTE AND FILE EXHIBIT 9.

A chattel mortgage must be acknowledged, filed and have an affidavit of good faith to be valid as to creditors. R.C.W. 61.04.020.

Degginger v. Seattle Brewing and Malting Company, 41 Wash. 385, 83 Pac. 898, is not only interesting in that it was decided at a time when a liquor license was assignable as a matter of right and for that reason was held to be intangible property, but also in that it held that a security assignment of such a license must be filed and executed in accordance with the chattel mortgage statute to be valid as to creditors. This case has never been reversed despite the dicta in a few cases that personal property as set forth in the chattel mortgage statute does not include intangible personal property.

It was mentioned before in this brief that in the event a sum of money rather than an undivided interest in the plant is distributed to the partners after the West Tenino Lumber Company is wound up *Farmers State Bank v.*

Scheel, 124 Wash. 429, 214 Pac. 825, and *First National Bank v. Farm Loan & Invest. Co.*, 140 Wash. 410, 249 Pac. 983 are in point.

Each of these cases involved the right of a security assignee to a sum of money due assignor for the summer fallow of land. Both cases decided that the instrument assigning the sum of money to be due the security assignor under the terms of a lease, to be valid had to have an affidavit of good faith and an acknowledgment and be filed in accordance with the chattel mortgage statute.

See *Ackerson v. Babcock*, 132 Wash. 435, 232, Pac. 335, discussed in this brief on page 18, wherein a security assignment of a lease by a landlord who did not have the right to possess the land was held to be a chattel mortgage and invalid as to attachment creditor of landlord because the assignment did not have an affidavit of good faith, an acknowledgment and was not filed.

Appellant stipulated that Exhibit 9 was not filed (R. 143). It did not have an affidavit of good faith or an acknowledgment (R. 100).

III. C. THE TRANSACTION UPON WHICH APPELLANT RELIES FOR RELIEF WAS NOT PERFECTED AS A PLEDGE OF AN ACCOUNT BECAUSE OF FAILURE TO FILE NOTICE THEREOF WITH THE SECRETARY OF STATE:

R.C.W. 63.16.030 provides:

“NOTICE OF ASSIGNMENT—FILING. No assignment of an account shall be valid as against present or future creditors of the assignor, or as against a subsequent

assignee of such account without knowledge of such assignment, unless such assignment shall be in writing and be signed by the assignor, and unless there shall be on file in the office of the filing officer, at the time of the making of such assignment or within ten days thereafter, an effective and uncanceled notice signed by the assignor and the assignee, in substantially the following form:

NOTICE OF ASSIGNMENT OF ACCOUNTS RECEIVABLE

Date.....

..... has assigned or intends to assign one or more accounts receivable to.....

.....
Signature of Assignee

.....
Signature of Assignor

.....
Address of Assignee

.....
Address of Assignor"

R.C.W. 63.16.010 (6) provides:

"DEFINITIONS. "Filing officer" means the secretary of state."

Appellant stipulated that notice of Exhibit 9 was not filed with the secretary of state (R. 143).

EXPLANATION OF AUTHORITIES CITED BY APPELLANT

Heermans v. Blakeslee, 97 Wash. 647, 167 Pac. 128, cited by appellant as a leading case for the proposition that the chattel mortgage statute does not refer to intangible property, was explained in *Fales Co. v. Seiple Co.* 171 Wash. 630, 19 P. (2d) 118. This case involved a security assignment of a trade account. The court made the following statement:

"*Heermans v. Blakeslee*, 93 Wash. 595, 161 Pac. 489

97 Wash. 647, 167 Pac. 128, is not in point. Heermans, an assignee of a portion of the accounts receivable of a water company, sought an accounting from the defendant Blakeslee for moneys received by the latter through writs of garnishment issued upon a judgment rendered in favor of Blakeslee against the water company, which had assigned to Heermans present and future earnings, etc. Heermans also prayed for an order restraining Blakeslee from causing to be issued additional writs of garnishment against the debtors of the water company. The plaintiff claimed that, as assignee of the water company, he was entitled to all the moneys so acquired and sought to be acquired, by Blakeslee. Defendant's Demurrer to the complaint was sustained and the action dismissed. The judgment was affirmed on appeal. We said:

"The complaint alleges that the suing out of the writs of garnishment is impairing appellant's contract of assignment and impairing his said security, but we find no allegations in the complaint to support these conclusions of law. Since the contract of assignment was an assignment in effect of one-half of the income of the water company, then, before the security of the appellant could be impaired, it was necessary to set out facts which would show that the particular sums garnished were the property of the appellant, or that the respondent, in issuing writs of garnishment, was taking more than one-half of the income assigned by the water company to the appellant. Since the complaint does not show these facts, it is clearly insufficient to base a cause of action upon for an accounting, or for an injunction to restrain the respondent from collecting his judgment against the water company." *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128,

129; 171 Wash. 645, 646, 19 P. (2d) 123.

Judge Boldt stated that the "assignment" dated December 30, 1952, in fact is not an assignment but by its terms purports to be a pledge (R. 48).

In *National Bank v. Farm Loan & Invest. Co.* 140 Wash. 410, 249 Pac. 983, the court held a security assignment of a lease was a chattel mortgage and added, had the assignment been absolute a different question would be presented.

Appellant failed to distinguish assignments from security transactions in his brief.

In *Hammer v. O'Laughlin*, 8 Wash. 393, 36 Pac. 257, the appellant claimed that the bill of sale in question was a chattel mortgage and to be enforceable as to creditors it had to be executed and filed as a chattel mortgage. The court said:

"The substance of such testimony was that he was the owner of the property by virtue of a sale to him evidenced by said bill of sale; that the firm was indebted to him for a large sum of money, and was responsible for the obligations of certain of the men in its employ; that the property was sold to him for the purpose of paying such indebtedness, and if sufficient proceeds could be derived therefrom, also paying the obligations of the men. Such testimony directly negatived any idea on the part of the parties to the sale that any right to the property or to who made the bill of sale. Such being the fact, there was nothing in the transaction which would change the presumption that the bill of sale was what it purported to be." 8 Wash.

394, 36 Pac. 257.

Bankrupt did retain a right to the property encumbered. Exhibit 9 was given to act as continuing security until the note was paid in full. The acts of the parties after Exhibit 9 was signed proved that bankrupt retained a right to the property.

The following cases cited by appellant involved absolute assignments and are to be distinguished from Exhibit 9 (R. 100) which was given as security "until said note is paid in full."

Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238, involved an absolute assignment. Mortgages and pledges were not considered.

Cox v. Bateman, 139 Wash. 135, 245 Pac. 928 involved an absolute assignment and not a pledge or a mortgage. The court said:

"Whatever amounts were received by the bank were to be applied as of the date of the receipt, on the notes." 139 Wash. 136, 245 Pac. 928.

Mortgages and pledges were not considered in this case.

Horchover v. Pacific Marine Supply Co., 171 Wash. 330, 17 P. (2d) 915, involved rights under an absolute assignment in payment of a debt. The court did not consider whether a mortgage or pledge was involved.

Lloyd L. Hughes, Inc. v. Widders, 187 Wash. 452, 60 P. (2d) 243, is explained on page 17 of this brief.

R.C.W. 25.04.270 is explained on page 14 of this brief.

CONCLUSION

It is respectfully submitted that Exhibit 9 is not valid as

to the trustee in bankruptcy, and that the order of the District Court should be affirmed in all respects.

Respectfully,

STANLEY J. KRAUSE

For Appellee

APPENDIX

BANKRUPTCY ACT:

Section 60a (7) of the Bankruptcy Act (11 USC §96 (a) (7)) provides as follows:

(7) Any provision in this subdivision (a) to the contrary notwithstanding if the applicable law requires a transfer of property other than real property for or on account of a new and contemporaneous consideration to be perfected by recording, delivery, or otherwise, in order that no lien described in paragraph (2) could become superior to the right of the transferee therein, or if the applicable law requires a transfer of real property for such a consideration to be so perfected in order that no bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee, the time of transfer shall be determined by the following rules:

1. Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which recording, delivery, or some other act is required, and compliance therewith is had within such stated period of time; or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days, and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer.

II. Where compliance with the law applicable to the transfer is not had in accordance with the provisions of

subparagraph I, the transfer shall be deemed to be made or suffered at the time of compliance therewith, and if such compliance is not had prior to the filing of the petition initiating a proceeding under this Act, such transfer shall be deemed to have been made or suffered immediately before the filing of such petition.

UNIFORM PARTNERSHIP ACT

Sections 1-2-25-26-27-28-40 (1) (2) (3) (R.C.W. 25.-04.010 - 25.04.020 - 25.04.260 - 25.04.270 - 25.04.280 - 25.-04.400 (1) (2) (3)).

“25.04.010 *Short title.* This chapter may be cited as the uniform partnership act.

“25.04.020 *Definition of terms.* In this chapter:

“Conveyance” includes every assignment, lease, mortgage, or encumbrance.”

“25.04.250. *Nature of a partner's right in specific partnership property.* (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of

rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner, his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

“25.04.260 *Nature of partner's interest in the partnership.* A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

“25.04.270 *Assignment of partner's interest.* (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignees, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information

or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

"25.04.280 Partner's interest subject to charging order.

(1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose in-

terests are not so charged or sold.

(3) Nothing in this chapter shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

“25.04.400 *Rules for distribution.* In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(1) The assets of the partnership are:

(a) the partnership property,

(b) the contributions of the partners necessary for the payment of all the liabilities specified in subsection (2) of this section.

(2) The liabilities of the partnership shall rank in order of payment, as follows:

(a) Those owing to creditors other than partners,

(b) Those owing to partners other than for capital and profits,

(c) Those owing to partners in respect of capital,

(d) Those owing to partners in respect of profits.

(3) The assets shall be applied in the order of their declaration in subdivision (1) of this section to the satisfaction of the liabilities.

FILING NOTICE OF ASSIGNMENT OF ACCOUNTS

Section 1, “63.16.010 *Definitions.* As used in this chapter:

(1) “Account” or “account receivable” means an open book account, mutual account, or account stated, due or to become due, and not represented by a judgment, note,

draft, acceptance, or other similar instrument for the payment of money; it includes rights under an unperformed contract written or oral for work, goods, or services which in the regular course will result in an account receivable; it excludes conditional sales contracts.

(2) "Assignment" shall include any transfer, pledge, mortgage or sale of an account.

(3) "Creditor" means a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent.

(4) "Debt" means the indebtedness owing on an account.

(5) "Debtor" means any person by whom an account is owing to the assignor.

(6) "Filing officer" means the secretary of state.

No. 14534

**United States
Court of Appeals**
for the Ninth Circuit.

TONY BORDENELLI and EYVOHN BORDE-
NELLI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
Third Division**

FILED

MAY -2 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

WILLIAM T. PLUMMER,
United States Attorney,
Anchorage, Alaska,
Attorney for Plaintiff.

T. STANTON WILSON,
P. O. Box 1753,
Anchorage, Alaska,
Attorney for Defendants.

Application for Liquor License in the Territory
of Alaska, Third Division

License No. Application No. 4004

1. We, Tony and Eyvohn Bordenelli, the undersigned, doing business as Rainbow Cafe Annex, hereby apply for a dispensary liquor license for the year ending December 31, 1954, and tender herewith the sum of \$500.00 plus a filing fee of \$18.00.

2. Name and address and how long a resident of Territory of Alaska?

Name: Tony and Eyvohn Bordenelli.

Address: Kenai, Alaska.

How long a resident: 7 years.

3. Is this a first application, or for a renewal?:
Renewal.

Type of License

Beverage Dispensary

Population less than 1,500\$500.00
* * *

(Minimum residence 1 year.)
* * *

5. Location of business to be conducted under license applied for: Rainbow Cafe Annex, Kenai, Alaska.

6. Distance by any public thoroughfare, street or alley, from any school ground or church?: 1,500 feet, school; 950 feet, church. (If within 200 feet, and not a renewal, attach plat showing exact location.)

7. Have you any other kind of liquor license? If so, state its kind and where used: No.

8. Endorsements as to character and integrity of applicant, and desirability of issuing license applied for. (Five Endorsers Must Sign Personally Below.)

Louis Nissen, Box 12, Kenai, retired, 40 years residence in Territory.

Mary Nissen, Box 12, Kenai, housewife, 43 years residence in Territory.

Nick Kalifoncz, Box 12, Kenai, retired, 69 years residence in Territory.

George Miller, Gen. Del., Kenai, fisherman, 34 years residence in Territory.

Venue Morey, Box 11, Kenai, business, 8 years residence in Territory.

9. Are you a citizen of the United States? If so, born or naturalized? Yes—Born.

10. If a corporation, are you qualified to do business in the Territory?

11. For Use Outside of Incorporated Towns: I have attached hereto a complete written list, alphabetically arranged, of all citizens of the United States over the age of 21 years residing within a radius of one mile of the place for which the license is desired, stating the actual place of residence of each, by street and number where possible, and the length of such residence thereat, verified by oath by the person taking the actual census and that said

census was taken within six weeks prior to the date of this application. I have also attached hereto a petition containing the names of a two-thirds majority of all citizens over the age of 21 years residing within one mile (radius) of the place where liquor is to be sold, bartered, manufactured, etc.

12. Applicant Declares: If application is for Retail or Dispensary license, if an individual or association, that he has resided in Alaska for at least one year prior to the date of this application;

If a corporation, that it is qualified to do business in Alaska;

If application is for a Beverage Dispensary or Retail Liquor license, that no corporation, wholesaler, owner, officer or representative of any brewery, winery, bottling works or distillery owns any interest in such business or has financed directly or indirectly the applicant in procuring quarters or supplying equipment or furnishings in order to conduct such business;

That no person or persons other than the applicant has any direct or indirect financial interest in the business for which this license is sought; that he or she will superintend in person, the management of the business and if any other person is employed to manage the same, that he or she will have the qualifications of an applicant and that applicant will be responsible for the proper conduct of the business;

That the building in which liquor is to be sold is 200 feet or more from any school ground or church, or, if the license is a renewal that it is for a building in which the sale of intoxicating liquor was authorized by law on March 23, 1949;

If a retail Liquor license is applied for, that the premises are not connected by doors or otherwise with premises upon which any other business is conducted;

If application is for a Club license, that applicant has been incorporated under Territorial or National charter for two years or more.

/s/ EYVOHN BORDENELLI,

/s/ TONY BORDENELLI.

United States of America,
Territory of Alaska—ss.

Tony Bordenelli, being first duly sworn on oath, deposes and says: I have read the foregoing application on the face and back hereof and the same is true in all respects.

/s/ TONY BORDENELLI,

/s/ EYVOHN BORDENELLI.

Subscribed and sworn to before me this 7th day of December, 1953.

[Seal] /s/ BETTY ROSS,

Notary.

My commission expires 7/18/56.

In the District Court for the Territory of Alaska
Third Division at

In the Matter of the Application of

.....

For an Intoxicating Liquor License

ORDER

Upon consideration of the facts set forth and the statements made by the applicant in the foregoing application, and all or any facts adduced in relation thereto, and the Court being fully advised in the premises, the Court finds that the applicant is entitled to the license applied for, and It Is Hereby Ordered that the Clerk of the Court shall issue the same.

Dated at Anchorage, Alaska, this 31st day of December, 1953.

/s/ JOHN L. McCARREY, JR.,
District Judge.

Instructions

1. Each individual of a partnership must sign and swear to the application.

2. Applications for liquor licenses outside of incorporated towns, together with census and consent petition, must be filed with the Clerk of Court three weeks before order for issuance of license will be signed.

3. The census must conform in every detail as outlined in item eleven.

4. Application must be sworn to before Notary Public, United States Commissioner or Postmaster.

Must Be Completed and Signed by Applicants
Outside of Incorporated Towns Only

Kenai, Alaska,

Dec. 7, 1953.

We, Tony and Eyvohn Bordenelli, the applicants on the foregoing application for a dispensary liquor license, do hereby certify that the number of citizens over the age of twenty-one years that reside within a one-mile radius of my place of business are 252 in number; that the number of bona fide and qualified citizens that have signed the petition that accompanies my application are 181.

/s/ EYVOHN BORDENELLI,

/s/ TONY BORDENELLI,

Applicants.

Note: Section 12. Penalties. A violation of any of the provisions of this Act shall be deemed a misdemeanor, and upon conviction thereof shall be punished by imprisonment of not more than one year, or by a fine of not more than Five Hundred Dollars (\$500), each violation to be considered a separate offense. Any intoxicating liquors shipped into the Territory, other than to licensees hereunder

and contrary to the provisions of this Act, shall be deemed contraband, and subject to confiscation by the Territory, or any enforcement officer, and any intoxicating liquors so seized shall be sold under the order of the District Court, and the proceeds thereof deposited with the Territorial Treasurer.

That any false material statement made in any part of this application shall be deemed perjury and upon conviction thereof shall be subject to the penalty provided by law for the crime of perjury.

[Endorsed]: Filed December 7, 1953.

Entered December 31, 1953.

Certificate of Applicant

I, Eyvohn Bordenelli, the applicant of the attached liquor application, do hereby certify that the building in which liquor is to be sold is 1,500 [school ground] 950 [church] feet by the shortest direct line from a school ground or church.

Signed:

/s/ EYVOHN BORDENELLI,
Applicant.

[Endorsed]: Filed December 7, 1953.

Certificate of Applicant

I, Tony Bordenelli, the applicant of the attached liquor application, do hereby certify that the building in which liquor is to be sold is 1,500 [school ground] 950 [church] feet by the shortest direct line from a school ground or church.

Signed:

/s/ TONY BORDENELLI,
Applicant.

[Endorsed]: Filed December 7, 1953.

In the District Court for the Territory of Alaska,
Third Division

In the Matter of:

The Application of TONY and EYVOHN BORDENELLI, Kenai, Alaska, Doing Business as RAINBOW CAFE ANNEX, for a Beverage Dispensary Liquor License

PETITION

We, the undersigned, citizens of the United States and bona fide residents of the Territory of Alaska, over the age of twenty-one years, residing within the one (1) mile area of Rainbow Cafe Annex, and having been physically present, living, and residing within the one-mile area for more than six out of the twelve months immediately preceding the filing of this Petition, and in good faith, consent to, and ask that a liquor license (dispensary) be issued to

Tony and Eyvohn Bordenelli, doing business as Rainbow Cafe Annex, for such sale of intoxicating liquor in the voting and recording precinct in which the aforesaid described premises are located for the year ending December 31, 1954.

[Here follow the 187 signatures, addresses and length of residence.]

[Endorsed]: Filed December 7, 1953.

AFFIDAVIT

November 20, 1953.

I, Betty Ross, being first duly sworn, say: That the following is a full and complete census of all citizens over the age of 21 years, residing within a one-mile radius of Rainbow Cocktail Lounge during the preceding six months; and that it was taken within the last two weeks.

/s/ BETTY ROSS.

Subscribed and Sworn to before me this 20th day of November, 1953.

[Seal] /s/ ELINOR ELDRIDGE,
Notary Public,
Residing in Kenai.

My commission expires 6-8-57.

[Here follow the 187 typed names of citizens who signed the foregoing petition.]

[Endorsed]: Filed December 7, 1953.

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Tony Bordenelli, being first duly sworn on oath,
deposes and says:

That he makes this affidavit for and on his own
behalf and for and on behalf of Eyvohn Bordenelli;

That neither he nor Eyvohn Bordenelli have vio-
lated any of the Territorial Liquor Laws of the
Territory of Alaska, and have not been convicted
of any such violation.

/s/ TONY BORDENELLI.

Signed, sealed and executed in the presence of:

/s/ T. STANTON WILSON,

/s/ FLORENCE SESSOMS.

Subscribed and sworn to before me this 29th day
of December, 1953.

[Seal] /s/ FLORENCE SESSOMS,

Notary Public in and for
Alaska.

My commission expires 5-21-57.

[Endorsed]: Filed December 29, 1953.

[Title of District Court and Cause.]

HEARING ON APPLICATION FOR BEVER-
AGE DISPENSARY LIQUOR LICENSE
TO EXPIRE DECEMBER 31, 1954

Now at this time hearing on application for beverage dispensary liquor license to expire December 31, 1954, came on regularly before the Court in cause No. L. B. & W. 4004, entitled In the Matter of the Application of Tony and Eyvohn Bordenelli at Kenai for a beverage dispensary liquor license. Applicant present and with T. Stanton Wilson, their counsel. No protestants let their presence be known to the Court.

Anthony Bordenelli, being first duly sworn, testified for and in behalf of the applicants.

Counsel for applicants directed to submit brief on the matter.

Decision Reserved.

Entered December 29, 1953.

[Title of District Court and Cause.]

BRIEF OF APPLICANTS, TONY BORDE-
NELLI AND EYVOHN BORDENELLI

History of Matter

The question as to whether a reissue or renewal of a Liquor License granted to the above-entitled

applicants is legal under the existing Territorial Laws grows out of the following facts:

The original application, petition and census, requesting a Liquor License, was filed March 13, 1953, and as a result of a Hearing had before the late Judge Dimond, the applicants were granted permission by the Court to file a new petition and census. However, before the Order had been signed Judge Dimond had passed away and Judge George Folta signed the order. The applicants prepared a new census and filed a new petition and did so under the existing law which permitted an applicant who was beyond 200 feet from a church or school to apply for a Liquor License. The petition and census herein referred to was filed on the 20th day of June, 1953. It was done by special permission of the Court, and in accordance with the Order signed on the 16th day of June, 1953, by Judge Folta. It might be pointed out here that an amendment was added to the Territorial Liquor Laws which changed the allowed distance an applicant could be from a church or school, and changed the required number of signers on a petition. That law did not become effective until June 30, 1953, and the applicants could not have filed under those regulations until that time. After the necessary three weeks' waiting time had elapsed the License Order was signed by Judge Earl Cooper the 21st day of July, 1953. The applicants herein operated their liquor bar until the 12th day of October, 1953, at which time they were requested to close as a result of Judge Folta's

ruling of revocation of said license. Judge Folta presumably based his revocation on one or all of six reasons set out in an Order to Show Cause Why License Should Not Be Revoked. The Court has indicated that it is concerned here only with No. Six (6), which reads as follows: “(6) The census and list of process consenting to the issuance of the license failed to comply with the law which became effective June 30.” A Minute Order came out of Judge Folta’s office from Juneau, Alaska, October 12, 1953, revoking said Liquor License.

The applicants herein have now filed application for a renewal of their Liquor License and have done so with full compliance of the Laws of the Territory of Alaska. Proof of the matter has been taken by the testimony in open court of Tony Bordenelli, that he filed an application for renewal; a petition showing a $\frac{2}{3}$ majority of signatures from a census prepared and filed of those eligible people residing within a one-mile radius of his place of business, an affidavit that he has not been guilty, and that his wife has not been guilty of an infraction of the Territorial Liquor Laws, and the necessary bond have also been filed with the Court. The applicants have shown by testimony that their place of business is closer than $\frac{1}{4}$ mile from a church and school but make application under the new statute passed by the last Territorial Legislature, which is as follows: “* * * Provided, however, that a license may be reissued for the sale of intoxicating liquor in

any building in which such sale was authorized by law at a time subsequent to March 23, 1949."

Applicants' Contention

The applicants contend that they were authorized by law at a time subsequent to March 23, 1949, to sell intoxicating liquor in their building since they had a valid license from July 21, 1953, to October 12, 1953. They contend that although said license was revoked that it only took away their right and privilege previously granted and did not nullify the legality of their actions previous to that time.

The applicants contend that their petition and census under which they obtained their license was filed at a time when they were only required to follow the procedure as outlined by the law in effect at the time of the filing, to wit, ten days before the new law took effect. They contend that although the Order granting license was signed after the new law came into being that that did not place upon them the responsibility of having to abide by a law that did not exist at the commencement of the proceeding. The signing of the Order was in the nature of a *Nunc Pro Tunc* decree.

Argument

The legal question presented by this application for a liquor license is: Does the Revocation of Liquor License on October 12, 1953, by Judge Folta Nullify, Vitate, or Invalidate Same in Such a Manner as to Preclude Applicants From Having

Been "Authorized by Law" to Sell Intoxicating Liquor at a Time Subsequent to March 23, 1949?

It is assumed by the applicants that the Court felt that the issue here stated hinged on one of the presumable reasons for the revocation, to wit: (6) The census and list of process consenting to the issuance of the license failed to comply with the law which became effective June 30, 1953.

The applicants base their argument for a renewal of license on two simple arguments:

I. The applicants obtained their original license under the laws in effect prior to June 30, 1953, and were only required to follow the procedural steps as set out by that law in effect at the time of commencement of proceedings.

II. That the license was a valid one while it existed and the revocation of same did not vitiate or destroy its legality while it existed.

I.

The petition and census was filed by special permission of the Court ten days prior to the effective date of the new law on June 30, 1953. Chapter 116, SLA, 1953. The applicants complied with the laws in effect on the 20th day of June, 1953, which required that they have a majority of the residents as signers on their petition and which only required that they be outside 200 feet from church or school, and were granted a license under that law, and since the license was granted under that law, it

could not be subjected to the argument that the applicants had not complied with the new law. This reasoning is based on the following statute which reads as follows:

“Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made.” Civil Code, Sec. 19-1-1, ACLA, 1949.

The applicants submit that once having started their petition under one set of laws that they had a right to a prosecution to conclusion under those laws. The applicants do not think that the fact that signature was placed on order granting such license after the new law became effective in any way affected the legality of their application, or could have possibly brought it within the purview of another statute. The applicants contend that once they had filed petition and census under the old law as heretofore stated, that they had a “proceeding commenced prior to such repeal” and had “rights accruing”

under such action. This fact is especially important inasmuch as the applicants had been in the process of obtaining such license since March, 1953.

An amendment to such a law could not have a retroactive effect such as to nullify the action that had been set in motion. 50 American Jurisprudence 481.

II.

The Order for License signed by Judge Earl Cooper was the authorization by law to sell liquor. It was made subsequent to March 23, 1949, and if the revocation of such license did not have the effect of nullifying said authorization from the beginning the applicants contend that this places them within the exception allowing a reissue of license. The only reason for a denial of such would be in the event that the applicants had been "guilty of a violation law." Surely the revocation of a license for the technical reasons as listed by Judge Folta could not be compared to a "violation of law," as outlined in the law, as for example, the selling of liquor to a minor. The applicants contend that their license was validly issued; that while in existence, it was good; that a revocation has only the effect of "extinguishing all rights and privileges acquired or held under it." Vol. 48, Corpus Juris Secundum, Intoxicating Liquors, Section 180. Effect of Revocation. No cases can be found to indicate that a revocation nullifies the validity of a license. It is good until revoked, suspended, or until it expires.

Can it be said that a revocation because of a more serious offense, such as selling to minors, has the effect of placing the operator in the position of having been operating a place of business illegally? This is an unusual case. It is one which, to applicants' knowledge, has not arisen in the Territory of Alaska, and authority with regard to such a revocation is difficult to find, but under Vol. 48, Corpus Juris Secundum, Intoxicating Liquors, Sec. 156, Evidence, the following is said which irrefutably shows that a revocation does not mean that the license was void from the beginning:

“* * * An application for the renewal of license or permit which has expired, or for the restoration or renewal of a license which has been revoked, must be treated as a new application, throwing the burden of proof on applicant.”

While this pertains to the proof it indicates that a license can be renewed or reissued, following a revocation. The Territorial statutes also set out the reasons for a denial of a renewal—that based on a revocation for cause, to wit, the “violation of law,” meaning an infraction of the Territorial Liquor Laws.

Summary and Conclusion

On the basis of the foregoing statements it is submitted that:

1. The applicants filed their original petition and census under the laws in effect prior to June 30, 1953, and qualified under those rules and regula-

tions, and therefore the original petition, census and license were not affected by the amendments which became effective June 30, 1953.

2. That a legal and valid license was issued to them July 21, 1953, and that such remained their authority to sell intoxicating liquors until October 12, 1953.

3. That revocation on October 12, 1953, did nothing more than take away rights and privileges granted under said license and did not have a retroactive effect but abolished only their authority by law to sell liquors.

¹² 4. That applicants were authorized by law to sell intoxicating liquors subsequent to March 23, 1949.

5. That they are entitled to a renewal based on such authorization in accordance with Chapter 116, SLA, 1953, which amends Subsection (3) of Section 35-4-15, ACLA, 1949, as amended by Chapter 83, SLA, 1949.

Respectfully submitted,

/s/ T. STANTON WILSON,
Attorney for Applicants.

[Endorsed]: Filed December 30, 1953.

In the United States District Court for the District
of Alaska, Third Judicial Division, Anchorage

LB&W 4004

UNITED STATES OF AMERICA

vs.

TONY BORDENELLI AND EYVOHN BOR-
DENELLI

COMPLAINT

1. Now comes William T. Plummer, United States Attorney for the Territory of Alaska, pursuant to the provisions of Section 35-4-21, A.C.L.A. 1949, and complains of the defendants and alleges:

2. That on December 31, 1953, by order of the United States District Court for the District of Alaska, Third Judicial Division, the Clerk of said Court issued to the said defendants Beverage Dispensary License No. 5884 to sell and serve beer, wine and hard liquors for consumption on his premises at Kenai, Alaska, up to and including the 31st day of December, 1954.

3. That the said license so issued as aforesaid is invalid and in violation of the provisions of Section 35-4-15, A.C.L.A. 1949, as amended by Chapter 116, S.L.A. 1953, in that the building or place where said liquors are sold and consumed is less than one-quarter mile from a school ground or church building.

Wherefore plaintiff prays that the defendants be

required to appear before the above-entitled Court on a date certain and show cause, if any they have, why said license should not be revoked.

WILLIAM T. PLUMMER,
United States Attorney for the District of Alaska,
Third Judicial Division.

By /s/ JAMES M. FITZGERALD,
Assistant.

Duly verified.

[Endorsed]: Filed May 26, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading the verified complaint of the plaintiff on file herein, and good cause appearing therefore, upon motion of the United States Attorney for the District of Alaska, Third Judicial Division. It Is Ordered:

(1) That the defendants, Tony Bordenelli and Eyvohn Bordenelli, appear and show cause on the 25th day of June, 1954, at two o'clock p.m. of said day, before the above-entitled Court, or as soon thereafter as counsel can be heard, why liquor license No. 5884, issued to them on December 31, 1953, for the sale and consumption of intoxicating liquors during the calendar year 1954 on their premises at Kenai, Alaska, should not be revoked.

(2) That a copy of this order, together with a copy of the complaint herein, be served upon the defendants not later than the 9th day of June, 1954.

Dated at Anchorage, Alaska, this 26th day of May, 1954.

[Seal] /s/ J. L. McCARREY, JR.,
Judge, United States District Court for the District
of Alaska, Third Judicial Division.

[Endorsed]: Filed and entered May 26, 1954.

[Title of District Court and Cause.]

RETURN—SEVERAL DEFENDANTS

United States Marshal,
Territory of Alaska,
Third Judicial Division.

I hereby certify and return that I received the within and hereto-annexed OSC (Order to Show Cause) on the 28th day of May, 1954, and that on the 29th day of May, 1954, I personally served the same on Tony Bordenelli and Eyvohn Bordenelli, being the defendants named in the said Complaint and OSC Summons, in the city of Kenai, Third Judicial Division, Territory of Alaska, by then and there delivering to and leaving with Tony Bordenelli and Eyvohn Bordenelli, the said defendants, each personally, a true and correct copy of said OSC, and at the same time and place I delivered to and left with Tony Bordenelli and Eyvohn Borde-

nelli, the said defendants, each personally, a full, true and correct copy of the Complaint, in the action in said OSC referred to, certified to by the Clerk of Dist. Court, 3rd Div., Terr. of Alaska, attached to each copy of said OSC.

Date: May 29, 1954.

FRED S. WILLIAMSON,
United States Marshal.

By /s/ ALLAN L. PETERSEN,
Deputy.

Received May 27, 1954.

[Endorsed]: June 7, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Tony Bordenelli, being first duly sworn upon oath, deposes and says:

That he is one of the owners of the Rainbow Bar, Kenai, Alaska; that he has been served with an Order to Show Cause why liquor license No. 5884, issued to him and his wife, Eyvohn Bordenelli, should not be revoked; that he has read the complaint filed in the above-entitled matter and admits that the “building or place where liquors were sold and consumed” is less than one-quarter ($\frac{1}{4}$) mile

from a school ground or church building, but asserts that this information came before the Court at the hearing, which preceded the signing of the Order for the license; that said fact was presented to, and argued before, the Court; that affiant took the stand and testified that his liquor license was a renewal or reissue based on the fact that he had had a license during the year 1953, and that he was entitled to make application for another by virtue of that fact; that the issue was placed fairly and squarely before the Court; that during the year 1953 the minimum distance allowed by law between a building or place where liquors were sold and consumed and a school ground or church building was 200 feet, and he was beyond that distance.

That during the hearing all evidence and background pertaining to the matter was placed before the Court, fully advising the Court that such place of business came under the exception in the new 1953 law permitting places of business already established to continue in business although less than one-quarter ($\frac{1}{4}$) mile from a school ground or church building.

That affiant has relied on the former decision in this matter; that he has paid out a large sum of money in attorney's fees; that he has made large investments and secured loans on the strength of his being allowed to carry on his business; that if such is denied him he will suffer great and irreparable business losses.

That he feels that the issue raised in the complaint has been adjudicated and should not be reopened, and reference is made to the files wherein a brief and affidavits were filed by affiant's attorney.

Further affiant sayeth not.

/s/ TONY BORDENELLI.

Subscribed and sworn to before me, a Notary Public in and for the Territory of Alaska, this 23rd day of June, 1954.

[Seal] /s/ JULIANA D. WILSON,
Notary Public in and for
Alaska.

My commission expires: 8-16-54.

Receipt of copy acknowledged.

[Endorsed]: Filed June 23, 1954.

HEARING ON ORDER TO SHOW CAUSE AS
TO VALIDITY OF LIQUOR LICENSE

Now at this time Hearing on Order to Show Cause as to Validity of Liquor License in Cause No. L. B. & W. 4004, entitled In the Matter of the Application of Tony and Eyvohn Bordenelli, at Kenai, for a Beverage Dispensary Liquor License to expire December 31, 1954, came on regularly before the Court. Applicants present and with T. Stanton Wilson, their counsel. L. W. Kirkland, Assistant United States Attorney, present for and

in behalf of the Government. The following proceedings were had, to wit:

Argument to the Court was had by L. W. Kirkland, for and in behalf of the Government.

Argument to the Court was had by T. Stanton Wilson, for and in behalf of the Applicants.

Argument to the Court was had by L. W. Kirkland, for and in behalf of the Government.

Whereupon, Court directs respective counsel to file briefs if desired. Decision reserved.

Entered June 25, 1954.

[Title of District Court and Cause.]

BRIEF OF DEFENDANTS

History of Matter

The question which confronts the Court in the above-entitled matter is whether or not a reissue or renewal of a Liquor License as provided for in Chapter 116, Session Laws of Alaska, 1953, to wit: "provided, however that a license may be reissued for the sale of intoxicating liquors in any building in which such sale was authorized by law at a time subsequent to March 23, 1949," applies to a case where a license has expired, been suspended, or revoked, before application for renewal has been filed.

The defendants, doing business as the Rainbow Bar, Kenai, Alaska, had their Liquor License re-

voked by Judge Folta on the 12th day of October, 1953, not for "cause" but for procedural reasons. The defendants filed application for a renewal of liquor license based on the above-mentioned statute, which provides the exception that permitted them to obtain a renewal, although their building is less than one-quarter of a mile from a church building or school ground. The order granting the 1954 license was signed by Judge J. L. McCarrey, Jr., on December 31, 1953, after a hearing was had in open Court, at which time Tony Bordenelli testified to the effect that said place of business was less than one-quarter of a mile from a church building or school ground, and testimony qualifying on all other requirements was taken.

On May 26, 1954, a complaint was filed by the United States Attorney for the District of Alaska, Third Judicial Division, alleging a violation of the provisions of A.C.L.A. 1949, Section 34-4-15, as amended by Chapter 116, SLA 1953, in that the building or place where said liquors are sold and consumed is less than one-quarter of a mile from a church building or school ground, and an Order to Show Cause why the license should not be revoked was issued. Argument of the matter on the date set for showing cause why the license should not be revoked was limited to the issue of whether defendants could get a reissue or a renewal of a license that had been revoked (not for violations of the liquor laws, but for defects in the application procedure) under the amended statute, Chapter 116, SLA 1953.

Defendants' Contention

The defendants contend that they were authorized by law at a time subsequent to March 23, 1949, to sell intoxicating liquor in their building, inasmuch as they had a valid license from July 21, 1953, to October 12, 1953. They contend that although said license was revoked that it only took away their right and privilege granted for the year 1953.

The defendants further contend that inasmuch as they were granted a reissue of their license on the 31st day of December, 1953, by order of the United States District Court for the District of Alaska, Third Judicial Division, on the basis that same was a reissue of a license coming within the purview of the statute, Chapter 116, SLA 1953, that same should not be revoked arbitrarily; that the issue as presented in the complaint filed by the United States Attorney, to wit: "that said bar was less than one-quarter of a mile from a school ground or church building," was squarely faced at the hearing for the application for the license granted on December 31, 1953, and by the testimony of one of the applicants, Tony Bordenelli, it was definitely a considered fact that the building in which the applicants were doing business was less than the one-quarter of a mile as prescribed by law. But as was definitely brought to the attention of the Court, said license was granted despite that fact and was done so solely by classifying said location as coming within the exception as provided under the statute,

Chapter 116, SLA 1953. It is contended that since this issue was determined at the original hearing, and the issue raised in the complaint heretofore mentioned is no different, the decision is *res judicata*, and should not be reversed or revoked except for just cause, as set out in the statutes setting forth the various liquor violations. "It has been held that, if the hearing is before a court, its judgment conclusively determines all the points which it is required to consider, so that these matters are *res judicata* on an application for a renewal of the license, unless fresh issues are raised by a remonstrance; and an excise commissioner has been held to act judicially, so that his findings of fact are conclusive; * * *" 48 C.J.S., *Intoxicating Liquors*, Section 157, page 259.

Argument

One of the legal questions presented by this proceeding is: Can a liquor license that has been suspended, revoked or has expired, be renewed or reissued at a time subsequent to the revocation, suspension or expiration date?

The second legal question presented by this matter is: Can a liquor license once having been granted by order of the District Judge, be revoked at the discretion of the District Judge without cause or violation subsequent to the issue of said license?

I.

It is the contention of the defendants that it is possible to renew a license or permit which has

expired, or restore or renew a license which has been revoked. In 48 C.J.S., Intoxicating Liquors, Section 156, Evidence, the following is said which shows irrefutably that a revocation does not mean that the license was void from the beginning:

“* * * An application for the renewal of license or permit which has expired, or for the restoration or renewal of a license which has been revoked, must be treated as a new application, throwing the burden of proof on applicant.”

While this pertains to the proof, it indicates that a license can be renewed or reissued, following a revocation. Should it be argued that the application should then be treated as a new application, the defendants still contend that under the statute as written, even a new application must be allowed if in fact applicants had a building wherein they had sold intoxicating liquors and had a license to do so at a time subsequent to March 23, 1949.

The law as stated in Chapter 116, SLA 1953, definitely makes an exception to the law with reference to proximity to church or school. There could be no other legislative intent than to make provision for those people who had once done business in a building at a time subsequent to March 23, 1949, to protect the right and privilege to do business in that location, once having been granted that privilege, and having made investments in same. Chapter 83, SLA 1949, amending Section 35-4-15, A.C.L.A. 1949, and making a similar provision, stated: “* * * provided however that a license may

be reissued for the sale of intoxicating liquor in any building in which the sale of intoxicating liquor was at the time of the passing of this Act authorized by law." This was approved on March 23, 1949. Can it not be said then that the legislative intent is positively clear that it hoped to protect those people who were doing business in a location any time as far back as March 23, 1949? Otherwise the 1953 law would have made the exception effective at the time of the passing of the 1953 Act.

The statute must be strictly construed, and inasmuch as there is no other legislation similar to this to look to as a guide, we can interpret in no other way than that this is an exception under which those people who have done business in any of the years 1949, 1950, 1951, 1952 and 1953 are protected and are allowed to continue in business. It does not matter that there may have been a period of time in between those years that the business was not operated, and no matter whether it be a good policy or a bad one, that is the law as written, and must be construed as written. If it is a bad law, it must be repealed by the legislature and not by the Court.

II.

The law under Section 35-4-21, A.C.L.A. 1949, permits the judge of the District Court to revoke a liquor license upon the filing of a complaint by the United States Attorney, and sets forth certain violations of the law upon which such licenses may be revoked. It is contended here that said authority

is confined to a showing of violations subsequent to the issuance of the license, and that unless a showing is made that such violations have occurred, that a license should not be disturbed by the Court, if all facts and issues were presented to the Court at the hearing of the application. For a court to reverse itself or change its mind or admit error in granting a license for a reason the issues of which had once been determined, would place the operators under such a license in a position of uncertainty, and such cannot be the interpretation of the statute providing authority for revocation.

In this particular case the Court has indicated that the proximity to church and school was not considered at the time of the hearing and the signing of the order. The defendants feel that the testimony of Tony Bordenelli at the hearing brought directly to the Court's attention the fact of the nearness to the church and school; that much emphasis was placed on that fact, and much emphasis was brought to bear to show that they were within the exception of the new law as set forth in Chapter 116, SLA 1953.

Conclusion

On the basis of the foregoing, it is submitted that the defendants are entitled to retain the liquor license granted to them and that the same should not be revoked.

Respectfully submitted,

/s/ T. STANTON WILSON,

By /s/ J. D. WILSON,
Attorneys for Defendants.

Dated June 30, 1954.

Receipt of copy acknowledged.

[Endorsed]: Filed June 30, 1954.

[Title of District Court and Cause.]

MEMORANDUM OPINION

This matter comes before the court based upon an order to show cause why the liquor license of the above-named applicants should not be revoked for the reason that the building or place where said liquors are sold and consumed is less than one quarter of a mile from a school ground or church building in violation of the provisions of Section 35-4-15 A.C.L.A. 1949, as amended by Chapter 116 Session Laws of the Territory of Alaska, 1953.

A check of the United States District Court Clerk's office reveals that on the 13th day of March, 1953, the applicants filed an application for an LB&W license under file No. 3750. The file further discloses that protest petitions were filed and that a hearing on said application was commenced on the 4th day of May, 1953, before the Honorable Anthony J. Dimond, United States District Judge for the Third Division of the Territory of Alaska. Just prior to the conclusion of the hearing attorneys for the applicants moved the court for leave to submit

written calculations or in the alternative to submit and file a new petition and at the conclusion of the hearing the court granted applicants' motion to file briefs or calculations and the applicants were given time in which to file briefs and the protestants given time in which to file answering briefs and the motion to file a new petition was denied.

On May 27, 1953, applicants filed a motion to withdraw their application without prejudice with right to make another application for the reasons:

A. That the census and consent petition did not comply with the law.

B. That the 1953 Legislature for the Territory of Alaska had modified the liquor license law and that the applicants would be severely prejudiced if they were not allowed to make a showing under the new existing liquor law.

In conformance with the motion the Honorable George W. Folta signed an order on the 16th day of June permitting the applicants to withdraw the pending application without prejudice to the rights of the applicants to file a new petition herein, as there was no other court to handle the matter due to the untimely death of the Honorable Anthony J. Dimond, the latter part of May.

Thereafter, on the 29th day of June, 1953, by affidavit one of the applicants, Tony Bordenelli, filed a supplemental consent petition and on the 21st day of July, 1953, a license was issued by the Honorable J. Earl Cooper, at that time Acting Judge at Nome, Alaska. Thereafter, on the 5th day

of September, 1953, an order to show cause why the license should not be revoked was signed by the Honorable George W. Folta, which sets forth the following:

“It appearing from the records and file in the above-entitled matter that in the issuance of the license the law was not complied with in the following particulars:

“(1) No application was on file, the original having been denied and withdrawn.

“(2) No hearing upon any application was set.

“(3) The protestants were not notified.

“(4) The Court failed to consider any application before granting the license.

“(5) The Court failed to consider the protests on file.

“(6) The census and list of process consenting to the issuance of the license failed to comply with the law which became effective June 30.”

Thereafter, on the 12th day of October, the Honorable George W. Folta revoked the license upon the grounds as set forth in the order to show cause. On the 27th day of October the applicants, by their attorney, filed a motion to reopen the application of the applicants revoked by court and after hearing upon the motion and the testimony of the witnesses by the Honorable George W. Folta on December 4, the court denied the motion to reopen the matter.

Prior to the entry of the order on December 10 the applicants filed a new application for the year 1954 on the 7th day of December, and in conformance with the practice of the court this matter was set down and a hearing was had on the 29th day of December, 1953, at which time no protestants appeared, although a letter of protest had been received on the 24th day of December, reference the above-entitled matter and after a consideration of said application the court granted a liquor license for the year 1954, however, the court inadvertently failed to take into consideration the question of renewal of a liquor license at the time of the hearing of this application, being principally concerned with the location of the business in relation to the new law as to distance from church or school and not the legal interpretation of the question of renewal of license as is contemplated by Section 35-4-15 of the 1949 Compiled Laws of the Territory of Alaska, as amended by Chapter 116 of the 1953 Session Laws of the Territory of Alaska.

The sole question to be determined by the court in this matter is: Are the applicants entitled to a renewal of their liquor license for the year 1954 as contemplated by Section 35-4-15 of the 1949 Compiled Laws of the Territory of Alaska as amended by Chapter 116 of the 1953 Session Laws of the Territory of Alaska, after the 1953 license was once issued and then later revoked?

I am of the opinion that this question is best answered upon a definition of the word "renewal."

A scrutiny of the cases attempting to define the word "renewal" reveals that such definition is not easily defined legally (U. S. Campbell River Timber Co. vs. Vierhus, 86 F. 2d 675; Sheldon vs. Mississippi Cottonseed Products, 108 A.L.R. 763; 54 C.J.S. 379, Section 1; 76 C.J.S. 1146). Webster's New International Dictionary, Second Edition, defines the word "renewal" n. "renewing, or state of being renewed." The same authority defines the word "renew" v. transitive:

(1) To make new again; to restore to freshness, perfection, or vigor; also, to begin again as new; to reassume; as, to renew one's strength.

(2) To make new spiritually; to regenerate . . .

(3) To restore to existence; re-establish; recreate; rebuild; as, to renew the old splendor of a palace; to revive; to resuscitate; as, to renew the sentiments of youth.

(4) To repeat; to go over again; to make or do again . . .

(5) To begin again; to recommence; to resume...

(6) To replace; also, to restore to fullness or sufficiency . . .

(7) To grant or obtain an extension of; to continue in force for a fresh period.

Thus, as Volume 76 C.J.S. p 1164 aptly states "The term 'renewal' has no strictly legal or technical signification, and it is not a word of art. It may

be given different meanings, and it has different meanings, varying with the subjects with reference to which it is used. The cases construing the proper meaning to be ascribed to the term are by no means uniform; contracting, and the construction is controlled by the intention of the parties.”

It goes without saying that the liquor business must be carefully supervised and the common interest of the general public should be the guide post in issuing and renewing of licenses (*Sicherman vs. Driscoll*, 45 Atl. 2d 620). The issuance of the original license does not confer upon the licensee a right to insist that future application for renewal be governed by law in effect at the time of issuance of original license (53 C.J.S. 641, 642; 42 N.Y. Sup. 2d 498) and further the privilege conferred upon the licensee is purely personal in nature and is available and affords protection to the original licensee and to him alone and no others (53 C.J.S. 642, Section 42; 73 NE 884). Strictly speaking a liquor license is not a property or a property right nor does it create a vested right (53 C.J.S. 499, Section 2; 13 F. 2d 500; 158 P. 2d 199 and 36 NY Sup. 2d 774).

I am of the opinion that the renewal of liquor licenses the term renewal must be strictly construed and, therefore, the word cannot be defined in as broad a sense, but rather must be limited.

In this case we have the further problem of defining the word “revocation” or to revoke, since this license was revoked. Webster’s New Inter-

national Dictionary, Second Edition, defines the word "revoke" v.:

(1) "To annul by recalling or taking back; to repeal; to rescind; to cancel; to reverse; as anything granted by special act; as, to revoke a will, license, grant, law."

And the same authority defines revocation as n.:

(1) "Act of recalling, or calling back, or state of being recalled; recall.

(2) "Act of revoking; act by which one, having the right, annuls an act done, a power or authority given, or a license, gift, or benefit conferred; reversal; withdrawal, as the revocation of an edict, a power, a will, or a license.

(3) "Recantation; retraction. Obs."

77 C.J.S. 362 defines the word "revoke" as follows:

"The term 'revoke' is variously defined as meaning to recall, cancel, or set aside; to recall what one has done or promised; to annul; to annul or make void by recalling or taking back; to repeal; to rescind; to call back; to reverse; to abolish; to take back; to withdraw.

"The word carries with it the idea of cancellation by the same power which originally acted, and not the setting aside of an original order by another form of power or jurisdiction. It does not mean 'repudiation.'

“ ‘Revoke’ has been held equivalent to, or synonymous with, ‘cancel,’ see 12 C.J.S., p 936, note 19.3, ‘recall,’ see 75 C.J.S., p. 640, note 45; ‘repeal,’ see 76 C.J.S., p 1176, note 61, and ‘rescind,’ see ante p 276, note 37.

“It has been compared with, or distinguished from, ‘alter,’ see 3 C.J.S., p 898, note 90; ‘annul,’ see 3 C.J.S., p 1389, note 22; ‘regulate,’ see 76 C.J.S., p 615, note 79, and ‘rescind,’ see ante, p 276, note 38.

“ ‘Revoked’ has been held equivalent to ‘ceased,’ see 14 C.J.S., p 59, note 43, and ‘vacated,’ and has been distinguished from ‘suspended.’ ”

As is noted in the definition of the word “revoke” set forth in C.J.S. that the word “revoke” has been held equivalent to “ceased.” In other words, when the license was revoked in 1953 the same was vacated, cancelled, and these words carries with them the idea of an absolute cancellation.

It is to be noted in this case the same authority which granted the license for the year 1953, through the then Acting Judge, invoked its plenary powers to revoke the same, and, as defined by the dictionary and further amplified by C.J.S., once the license was revoked it became a nullity or, in other words, was taken out of existence; hence, it would be impossible to recreate something that no longer existed. Therefore, with the passing of the rights and privileges under the old license into an eternity where the same could not be revived, the full force and effect of the 1953 Session Laws automatically

came into effect. This provided, among other things, that no establishment could obtain a liquor license which was less than one-quarter of a mile distance from a school or church outside of incorporated cities, therefore, the qualifications set forth in Chapter 116 of the 1953 Session Laws of the Territory of Alaska could not be met by the applicants, hence a renewal of that license could not be obtained because the 1953 license had become a nullity and there was nothing left to renew.

I, therefore, am of the opinion that the 1954 license of the applicants should be revoked for the reasons set forth. Revocation of the applicants' liquor license is hereby ordered and the District Attorney's office is instructed to prepare an order of revocation accordingly.

Counsel for the applicants has submitted a brief and cited some law to the effect that this court does not have the authority to revoke the 1954 liquor license stating, among other things, that once a license was granted it became *res adjudicata*.

I am of the opinion that counsel's theory of the law in this respect is not in point and his position is so untenable that it does not warrant further consideration.

Dated at Anchorage, Alaska, this 2nd day of July, 1954.

/s/ J. L. McCARREY, JR.,
District Judge.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

M. O. RENDERING ORAL DECISION

Now at this time the Court rendered oral decision in cause No. L. B. & W. 4004, entitled in the Matter of the Application of Tony and Eyvohn Bordenelli, d/b/a Rainbow Cafe Annex at Kenai, Alaska, for a beverage dispensary liquor license to Expire December 31, 1954, and License Revoked, written decision to follow.

Entered July 2, 1954.

[Title of District Court and Cause.]

ORDER OF REVOCATION OF L. B. & W.

No. 5884

This matter coming on to be heard upon the motion of William T. Plummer, United States Attorney, for an order of revocation of L. B. & W. License No. 5884, issued to Tony and Eyvohn Bordenelli, doing business as Rainbow Cafe Annex, and the Court having considered the motion and having heard Lynn W. Kirkland, the Assistant United States Attorney, and T. Stanton Wilson, Esquire, attorney for the defendants, and the Court being fully advised in the premises,

It is Hereby Ordered that the said license be and hereby is revoked, and

It is Further Ordered that the United States

Marshal or his authorized representative forthwith seize the said license and return the same to the Clerk of the United States District Court for the Third Division, Territory of Alaska.

Dated at Anchorage, Alaska, this 27th day of July, 1954.

/s/ J. L. McCARREY, JR.,

District Judge.

[Endorsed]: Filed and entered July 27, 1954.

I Hereby Certify, that I received the within Order of Revocation of License No. 5884 on the 27th day of July, 1954, and personally served same on the 29th day of July, 1954, by delivering to and leaving with Tony Bordenelli a copy thereof and taking into my possession Territory of Alaska Liquor License No. 5884, and I now return the said Liquor License into Court.

Return Date: Aug. 2, 1954.

/s/ FRED S. WILLIAMSON,

U. S. Marshal.

\$500.00

No. 5884

Territory of Alaska
Division Number Three
For a Beverage Dispensary

LIQUOR LICENSE

Received from Tony and Eyvohn Bordenelli d/b/a Rainbow Cafe Annex, the sum of Five Hundred and no/100ths Dollars, for License for carrying on the kind of liquor business above named at Kenai, Territory of Alaska, Division Number Three, for the calendar year (or period) ending December 31, 1954.

Issued in compliance with the order of the District Court of Alaska, Division Number Three, duly made and entered December 31, 1953.

Issued at Anchorage, Alaska.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court of
Alaska, Third Division.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 10, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given, that Tony Bordenelli and Eyvohn Bordenelli, defendants above named,

hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Order of Revocation of L B & W License No. 5884, entered in this action on the 27th day of July, 1954.

Dated this 20th day of August, 1954, at Anchorage, Alaska.

WILSON & WILSON,

/s/ T. STANTON WILSON,

Of Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 20, 1954.

[Title of District Court and Cause.]

MOTION TO REINSTATE LIQUOR LICENSE
AND SUSPEND THE ORDER OF RE-
VOCATION PENDING APPEAL

Defendants, Tony Bordenelli and Eyvohn Bordenelli, move the Court for an Order Suspending the Order of Revocation of L B & W License No. 5884, and Reinstating said License to the defendants and staying further proceedings to the order of revocation entered on the 27th day of July, 1954, pending the appeal herein, upon the filing of a bond in such amount as the Court may direct, for the reason that irreparable damage will be done if the

defendants are forced to close down the operation of their business pending the appeal herein.

WILSON & WILSON,

/s/ T. STANTON WILSON,
Of Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 20, 1954.

[Title of District Court and Cause.]

HEARING ON MOTION TO REINSTATE
LIQUOR LICENSE AND SUSPENSION
OF REVOCATION PENDING APPEAL

Now at this time hearing on motion to reinstate liquor license and suspension of revocation pending appeal in Cause No. L.B. & W. 4004, entitled In the Matter of the Application of Tony and Eyvohn Bordenelli, at Kenai for a beverage dispensary liquor license to expire December 31, 1954, came on regularly before the court, the applicant represented by T. Stanton Wilson of their counsel, and L. W. Kirkland, Assistant United States Attorney, appearing for and in behalf of the Government. The following proceedings were had, to wit:

Argument to the Court was had by T. Stanton Wilson, for and in behalf of the applicant.

Argument to the Court was had by L. W. Kirkland, Assistant United States Attorney, for and in behalf of the Government.

Argument to the Court was had by T. Stanton Wilson, for and in behalf of the applicant.

Whereupon the Court, having heard the arguments of respective counsel and being fully and duly advised in the premises, Denied Motion.

Entered September 17, 1954.

[Title of District Court and Cause.]

COST BOND

No. LB&W 4004

Know All Men by These Presents: That we, Tony Bordenelli and Eyvohn Bordenelli, as Principals, and Continental Casualty Company, a corporation organized under the laws of the State of Illinois and authorized to transact surety business in the territory of Alaska, As Surety, are held and firmly bound unto the United States of America, the plaintiff above named, in the full sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The Condition of the Above Obligation Is Such That, whereas the defendants have appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed August 20, 1954, from the judgment of this court entered July 27, 1954, if the defendants shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed or such

costs as the appellate court may award if the judgment is modified, then this bond is to be void; but if the defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated this 17th day of September, 1954.

/s/ TONY BORDENELLI,
Principal;

/s/ EYVOHN BORDENELLI,
Principal;

CONTINENTAL CASUALTY
COMPANY,
Surety;

By /s/ GRACE M. McCONNELL,
Attorney-in-Fact.

[Endorsed]: Filed September 21, 1954.

In the United States Court of Appeals for the
Ninth Circuit

TONY BORDENELLI and EYVOHN BORDE-
NELLI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION

Comes now T. Stanton Wilson of Wilson & Wilson,
attorneys for appellants, Tony Bordenelli and

Eyvohn Bordenelli, and respectfully moves the Court that he be allowed an extension of thirty days in which to furnish Transcript of Testimony, for the reasons set forth in the accompanying Affidavit.

Dated at Anchorage, Alaska, this 21st day of September, 1954.

WILSON & WILSON,

By /s/ T. STANTON WILSON,
Of Attorneys for Appellants.

In the United States Court of Appeals
for the Ninth Circuit

TONY BORDENELLI and EYVOHN BORDE-
NELLI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

T. Stanton Wilson, being first duly sworn, upon oath, deposes and says:

That he is one of the attorneys for the Appellants, Tony Bordenelli and Eyvohn Bordenelli, in the above-entitled matter; that an extension of time for filing Transcript of Testimony in the above-entitled

matter has been requested, for the reason that the District Judge for the Third Division, Territory of Alaska, is out of town and will not be available until the 11th day of October, 1954; that the record of testimony is in the hands of the court reporters; that one of the court reporters is with the Court in Seward, Alaska, and that the other is in the city of Fairbanks, Alaska, and will not return until the 27th day of September, 1954; that the reporters have stated that they will need a few days following that time, in which to prepare the Transcript of Testimony; that this affidavit is not made for the purpose of delaying this matter; that every effort will be made to have the Clerk of the Court forward the Transcript of Testimony at the earliest possible time.

/s/ T. STANTON WILSON.

Subscribed and sworn to before me, a Notary Public, within and for the Territory of Alaska, this 21st day of September, 1954, at Anchorage, Alaska.

[Seal] /s/ JULIANA D. WILSON,
Notary Public in and for
Alaska.

My commission expires: 8-16-58.

(Certified true copy.)

[Endorsed]: Filed September 22, 1954.

In the District Court for the District of Alaska,
Third Division
No. L. B. & W. 4004

In the Matter of

The Application of TONY and EYVOHN BORDE-
NELLI, d/b/a RAINBOW CAFE ANNEX
at Kenai, Alaska, for Beverage Dispensary
Liquor License to Expire December 31, 1954.

Before: The Honorable J. L. McCarrey, Jr.,
U. S. District Judge.

December 29, 1953, 10:00 A.M

Appearances:

For the Applicants:

T. STANTON WILSON,
Attorney at Law.

PROCEEDINGS

The Court: Mr. Wilson, you may proceed. Mr. Wilson, the Court will point out to you in this particular case that he has gone over the file and the big problem that confronts the Court in this case is the fact that you may have had a license during the year 1953, but that was revoked for the following reasons: (1) No application was on file, the original, of course, was denied and withdrawn. (2) No hearing on any application was set. (3) The protestants were not notified. (4) The Court failed to consider any application before granting of the

license. (5) The Court failed to consider the protests on file, and (6) The census and lists of process consenting to the issuance of license failed to comply with the law which became effective June 30. Now, the first five of these reasons probably could be overlooked, the reason being that they are administration. Most of them were caused by that particular procedure, but No. 6 is a different story entirely as the Court views it and this, under the law as passed by the Legislature of 1953, was absolutely mandatory that there be a full compliance with the consents, which in this case was two-thirds within a one-mile limit. Now, based upon that the applicants did not comply with the law, and, therefore, was subject to collateral attack and as a result thereof was revoked. Now, did you ever have a bona fide license for the year 1953 so as to put you within the pervue of the exception of your liquor establishment within one-quarter of a mile of a school as set forth [2*] in the 1949 Session Laws and the Court's belief at this time is that this 6th exception of the reasons given for why the liquor license was revoked virtually did away with the right to have a license at any time and, therefore, you would not come within the exception as set forth.

Mr. Wilson: Your Honor, the assertion in Number 6 of the Order to Show Cause isn't an assertion in itself and is not necessarily in evidence in the case, however, it would be, was our intention and still is our intention that this petition was filed before June 30 and would, therefore, become effective

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

under the old statute and, therefore, would not require the two-thirds majority that is required under the new statute. Now, if you will refer to the record you will see that their petition was filed before June 30.

The Court: That isn't the point though. The question is, when was the license granted and under what law was the license granted?

Mr. Wilson: That is our argument that the law has granted, although the liquor license was signed after June 30, it was granted under a petition filed before the new law became effective and I don't believe that the signing of the order would necessarily affect it. I think it would be retroactive in that respect.

The Court: But then here we have an order to show cause why a license should not be revoked and among one of the reasons [3] No. 6 was given which we are directing our attention. You say that it was not necessarily found upon that basis. Well, the Court seems to be bound to the contrary because at that time, on the 12th day of October, 1953, we have the Judge holding, "It is hereby ordered that the beverage dispensary license for 1954 issued to Tony Bordenelli and Eyvohn Bordenelli d/b/a Rainbow Cafe Annex be and is hereby revoked."

Mr. Wilson: The Court did not state that it found under Section 6.

The Court: Well, wasn't there a hearing on it?

Mr. Wilson: There was no hearing. That was issued. That is why I filed a motion to reopen the

case. There was no hearing on that and it was filed from Juneau.

The Court: But then the Court must have given that as one of the reasons. Your statement is rebuttable because the Court signed it as one of the reasons and you state that he may not have found on that reason. That is rebuttable because the facts deny that statement.

Mr. Wilson: Now, your Honor, it is our contention that even though the license was revoked that that license was in effect from June 21 until October 12 and while it was in effect the Rainbow Cafe and Annex were authorized by law to operate and until that license was revoked they were operating a legal business. That being the case, it is our contention that they were, subsequent to April 23, 1949, authorized by law to establish a [4] place of business.

The Court: That is—let me just inquire though. That is your premise and that is your position and maybe counsel is right, but on the other hand if you obtained the license through fraud or misrepresentation, which the Court apparently found, then were you legally operating under a legal authorized license, because fraud violates everything it touches.

Mr. Wilson: We take issue with any misrepresentation or fraud and there certainly is nothing in the records to indicate there was anything false or anything misrepresented.

The Court: Counsel is correct in that respect, excepting this, you didn't—the Court was using that

as an example. For instance, you didn't comply with the law and you are right the Court does not infer there was any fraud or misrepresentation, but the fact that you didn't comply with the law due to, maybe your own fault or somebody else's fault, the mere fact the Court would issue a license under, well, misinformation, do you feel you had a bona fide license?

Mr. Wilson: I do, your Honor. I feel that there was a bona fide license and that it was revoked and that the only way the Court can deny a license under this law, under an authorized business to do business since April 23, 1949, is when the petitioner has been convicted of violation of the Territorial Liquor Laws. Now, the fact that the applicant technically was incorrect in filing his application for the liquor license does not mean that [5] he was guilty of violation of the laws, as such, the Territorial Liquor Laws and from all the interpretations of the statute we can find the violation of the liquor laws refers to such violations as a person can be found guilty of; such as, selling the liquor to a minor and it is, therefore—I submit, your Honor, that the license was valid while in effect and was in effect until October 12, 1953, therefore bringing him under the statute. Now, suppose that he had had his license and the matter had expired the year 1950. The same situation would have been presented to the Court.

The Court: Yes, but that is different though, Mr. Wilson. In that case he had a valid license. In this case the Court doubted very much he had a valid license.

Mr. Wilson: I say this: Does the Court feel that a person having had a license from July 23 until October 12 and had had it revoked for a specific violation of the liquor laws that would have been a revocation. Had that been the case would the Court say that the petitioner never had a valid license?

The Court: No, that is——

Mr. Wilson: It is the revocation that makes the license void.

The Court: Excepting in this case here the Court doubts that, even though you may in fact had the license, hung it upon the wall, it is doubtful in this Court's mind that you ever had a valid license. [6]

Mr. Wilson: We submit that the Third District Court judge signed the license and it was valid until revoked.

The Court: There is no question about that having been done, but if that was obtained without full compliance of the law, the failure to comply with the law initiated the variation of the law itself as if by order of the Court. Well, the Court feels that that is tantamount to the whole application and the Court further feels that counsel should submit some law on that point. I mean, you can have an opinion and the Court can have an opinion.

Mr. Wilson: I would like very much to be allowed to present a brief in that respect and would the Court like for me to put on proof of the case this morning or has there been protests that would justify going ahead with the matter?

The Court: There is only this one protest writ-

ten by Mr. Thornton and since the Court feels that the question of liquor licenses is not a right, but a privilege it must be strictly construed and, therefore, you have the burden of proof. I feel you should put on sufficient proof so as to overcome, even though these protestants are not here, and rebut their protests because you have the burden of proof.

Mr. Wilson: May I have the Court point out the substance of the protest?

The Court: “* * * Since this place of business, if the Rainbow Cafe, is within one-quarter mile of the school, it seems [7] a wasted effort to make further protest. Yet, because of our past experience with the applicants, I feel required to raise my voice * * *” Therefore, it must be principally the question that it does come within one-quarter of a mile.

Mr. Wilson: May I ask where the letter was written?

The Court: It was written from Washington—Sedro-Woolley, Washington, and written on the 24th of December. That came in response to a letter directed by the Chief Deputy Clerk which, I think, she did—well, since there had been protests on previous occasions, to advise them of the time that was coming up for hearing so they would know as to the time of the hearing and to be present if they so desired. Just a moment, please, the Court will check to see if there is anything else.

Mr. Wilson: May I point out to the Court, this is a peculiar case and there has been some controversy and technicalities have arisen which pre-

vented the petitioner from obtaining license the first time. Although the clerk of the Court was not obligated by law to notify any of the protestants, this protestant was notified and this protestant that you mentioned is no longer a resident of Kenai and is in the state of Washington.

The Court: I didn't say that either, Mr. Wilson. He just wrote the letter from—just a moment, please.

Mr. Wilson: I will at this time request permission to call Tony Bordenelli.

The Court: Just a moment, please, let me see if there [8] are any other points. He refers to the fact that the townsite map also bears it out, a U. S. Government Survey, that is reference to the fact it is within one-quarter of a mile from the school. He does not state that he has left the Territory of Alaska. You may proceed then.

Mr. Wilson: Did your Honor—did I understand he did not state that he had left the Territory of Alaska?

The Court: Yes, that is right.

Mr. Wilson: If I may call to the Court's attention, I believe that he stated he was no longer living in Kenai, that he did own property in Kenai.

The Court: He says, “* * * Unfortunately, I cannot appear for the hearing on the 29th of December. Until the moral atmosphere in Kenai clears, I prefer to keep my wife and three daughters elsewhere * * *” He didn't say himself, however.

Mr. Wilson: Yes.

The Court: He said, “* * * Nevertheless, ev-

everything we own is invested there and being forced to return for economic reasons is very possible. Over the past five years we have worked for the community's best interests because it coincided with our own. This protest is no exception * * *'' You may call your witness.

ANTHONY BORDENELLI

being first duly sworn upon oath, testifies as follows on

Direct Examination [9]

By Mr. Wilson:

Q. Would you state your full name to the Court, please? A. Anthony Bordenelli.

Q. Are you one of the owners in the Rainbow Cafe and Rainbow Cafe Annex? A. I am.

Q. Did you file an application for a liquor license? A. I did.

Q. What date did you file?

A. I believe it was July 21 that I filed it.

Q. Your renewal license—did you file a renewal license? A. Oh, yes, December 7.

Q. 1953? A. Yes.

Q. Did you file that on behalf of yourself and your wife? A. I did.

Q. What is your wife's name?

A. Eyvohn Bordenelli.

Q. Along with your application for a liquor license for the Rainbow Cafe Annex did you also file a census of those people living within a quarter mile radius of your place of business?

(Testimony of Anthony Bordenelli.)

A. Yes, I had Betty Bross—she got the census. She is Commissioner down there.

Q. She prepared the census for you at your instigation and [10] request? A. Yes, she did.

The Court: May the Court interrupt you. Did you say a quarter of a mile?

Mr. Wilson: Yes.

The Court: Well, the census must be within one mile.

Mr. Wilson: May I ask the Court if he would refer to the census in the application, please, sir.

The Court: "We, the undersigned citizens of the United States and bona fide residents of the Territory of Alaska, over the age of 21 years reside within one mile of the Rainbow Cafe."

Mr. Wilson: Is that right, two-thirds within one mile?

The Court: That is correct.

Q. (By Mr. Wilson): How many did you have listed on that census? A. 252 on the census.

Q. Did you circulate a petition thereafter for signatures of those people who were in favor of your having a liquor license?

A. Yes, sir, those who were eligible to sign for a liquor license.

Q. How many of those signatures do you have?

A. 181.

Q. Was that two-thirds majority of the census?

A. I believe it is.

Q. Are you and your wife citizens of the United States? [11] A. Yes, born here.

(Testimony of Anthony Bordenelli.)

Q. Now, how far is your place of business from the nearest school ground or church building?

A. I believe 950 feet from the church and I think it is about 1500 from the school. It is further than any place down there.

Q. Did you have that area measured or did you measure it yourself?

A. I took it off the map.

Q. Measured it off the map?

A. Yes.

Q. Now, you had filed a previous application for a liquor license, had you not?

A. Yes, I did.

Q. When was that license granted?

A. Yes, it was. We turned it in, oh, I believe it was the 28th of June, I believe it was. The new law went into effect two days afterwards.

Q. About the 28th of June you filed that application?

A. I think it was—30th or 31st of that month the——

Q. You had waited the necessary three weeks?

A. I believe I got it on July 21, the license.

Q. Was that—what date was that license granted?

A. I believe it was July 21.

The Court: That is correct, the license.

Q. Did you go in business immediately following that time? [12]

A. After I got my license?

Q. Yes.

A. Yes.

Q. And how long did you operate that business?

A. I believe October 12 they revoked it.

Q. Now, do you know Mr. Harold Thornton who has filed a letter in this case?

(Testimony of Anthony Bordenelli.)

A. Not too personal. I know of him. He lives across the street from me.

Q. What kind of business does he have across the street? A. A garage and restaurant.

Q. A garage and restaurant? A. Yes.

Q. What sort of business do you have?

A. A restaurant and bar, I did have.

Q. Do you know for a fact whether Mr. Thornton lives in Kenai or not now? A. Yes, I do.

Q. Is he living in Kenai?

A. No, I believe he has leased all his belongings to some party.

Q. Do you know approximately how long it has been since he was living in Kenai?

A. Well, I believe he came up here for the protest last time.

Q. But was he living there at that time?

A. He was living there at that time, but—let's see how was [13] that—I believe when Judge Diamond that he would be—sign a new petition without prejudice, I believe he came back up here. I believe he was gone then, but he made another trip back.

Q. In other words, he was not living in Kenai at the time you obtained your license?

A. No, he wasn't. Just as soon as I opened up and run awhile then he came back.

Q. For a visit or to live?

A. I was told he came back to close the bar.

Q. When you opened up your place of business under the liquor license did you have quite a large investment in that business?

(Testimony of Anthony Bordenelli.)

A. Yes, I did. I had all I could borrow to fix it up.

Q. Do you still have a large inventory of liquor on hand that you were forced to keep?

A. I do.

The Court: Counsel, that is irrelevant and immaterial. The only question we are concerned about is whether or not he complies with the law.

Mr. Wilson: Your Honor, I feel that no further questions are necessary in that he has shown that he has done everything necessary in the matter to obtain the license if he is qualified under the new statute and if, in fact, he had a valid license during the time he was in operation and I have no [14] further questions. If you have any——

The Court: The Court has one question. Mr. Bordenelli, I believe you testified that your place was farther than any other place from the church and school, is that correct?

A. Excepting one, the Last Frontier. I had forgotten it, but otherwise, I believe my place is farther than any place there in question now.

The Court: From the church?

A. From the church their place is just a little over 200 feet from there, but I believe my place is farther, excepting the Last Frontier.

The Court: How about the school—are any of these other places near the school?

A. They are all nearer than I am—any one you take. You see, the way it is laid out I am farther away from the church and school than anybody that

(Testimony of Anthony Bordenelli.)

is in there already. I am farther away than they are because you could take a ruler and map and never get no place—1350 feet, nowhere within that radius from any church or school.

The Court: And the rest of them, of course, have license?

A. They did have licenses before this new law came in and they are——

The Court: And they are complying with the '49 Act which provides if they were less than a quarter of a mile, but had a valid license during the year 1949 on through that they can [15] be issued another license?

A. Yes.

Mr. Wilson: I will ask one more question, if I may. Is there a bar directly, almost opposite your business?

A. Yes, there is.

Mr. Wilson: And have they obtained a new license for 1954?

A. They have—just about 20 feet from this fellow that is protesting mine. Your Honor, I believe—I don't know if this is necessary, but I believe the only reason he is protesting is because our restaurant has practically closed his restaurant and I think if he could freeze the bar out and thought maybe he could freeze the restaurant out because his restaurant has changed hands two or three times. That is the only objection I know of.

The Court: He said, "The Bordenelli business

(Testimony of Anthony Bordenelli.)

is immediately across the street from my garage and apartment."

A. Their bar is just 20 feet from his window, the other one, and he has never protested it. It is just, your Honor, as far as I know, that is my belief, on account of the restaurant more or less.

The Court: He has a restaurant there, does he?

A. Yes, and it has changed hands two or three times since our restaurant has been there.

Mr. Wilson: Your Honor, for the record he has filed an [16] affidavit stating that he has not been guilty of a conviction.

The Court: The Court has read that.

Mr. Wilson: But, I would like to ask it for the record. Have you or your wife been guilty or convicted of any violation or infraction of the Territorial Liquor Laws?

A. No, we haven't or any other thing.

The Court: Is there just you and your wife on this license?

A. Yes.

The Court: Formerly you had a partner?

A. We had Mike Sosiko, then he made different arrangements.

The Court: Well, that is all. You may step down. Do you have anything further to present?

Mr. Wilson: Your Honor, I would prefer to pursue my argument under the '53 statute having a right to reissue of the license because his authorization under the law—now, your Honor, if your

Honor prefers I would submit a brief in that regard——

The Court: I would prefer that you submit a brief as to that you have complied with the law and the Court told you in advance what the problem was and I think that you have the burden of proof to prove that you have complied with the law.

Mr. Wilson: I would like to read to the Court——

The Court: Don't you think it would be a waste of time. Wouldn't it be better to submit it in the form of a brief?

Mr. Wilson: Since I am going to submit a brief I think [17] it would.

The Court: Are there any protestants in the courtroom today protesting the issuance of a license to Tony and Eyvohn Bordenelli? Hearing none then the Court will continue this until the submission of briefs by counsel. [18]

Proceedings

The Court: The next matter to come before the Court, I believe we have the Kelly License, however, I would think it would be proper at this time to bring up the case of Bordenelli for the reason that these protestants are here from Kenai and it would be more opportune for them and for the Court to go right into this next application. So at this time unless there is objection thereto the Liquor License No. 4004 will be brought up for determination. Very well, now in this case a license was issued, a hearing was had sometime in January

of this year, as I recall, and at that time the Court did issue a license. Now, as I recall and I haven't looked at the file for several months, but as I recall there was a license application made before The Honorable Anthony J. Dimond. If my memory serves me correct that license was denied subsequent thereto and after the first day of July, 1953—I may be in error on that last statement—a license was issued by Mr. Cooper, who, at that time was judge from Nome. Subsequent to that time Judge Folta came along and revoked that license so there was no license in existence for the balance of the year 1953. Then as I pointed out to you this case was set down for hearing in January of this year, as I recall, and the hearing was had at that time. The principal determination of the Court was the question of location of the school in relation to this establishment. The question of a renewal of a license was not considered by this Court although the Court should have done [20] so at that time and this case now comes up before the Court as to whether or not this license was properly issued under the law in January of this year. At this time let the record show that Mr. Kirkland appears for and on behalf of the Government at the request of the Court and let the record also show that Mr. Stanton T. Wilson appears for and on behalf of the applicants and there are a number of people in the audience who want to be heard in respect thereto. I would think that possibly the better procedure would be to have the witnesses take the stand at this time in protest thereto for the reason that the license has been

issued and that way then put the matter at issue before the Court.

Mr. Kirkland: I feel as though, your Honor, that it is more of a question of law at this particular time—if this license was validly issued by the Court due to the——

The Court: I agree with you in that respect, however, I would like to hear the protestants as to what they have to say in respect thereto. So will you please call the protestants and thereafter the Court will hear counsel as to argument and also hear the licensee if he wants to be heard.

Mr. Wilson: If it please the Court, this is an order to show cause.

The Court: Why it should not be revoked.

Mr. Wilson: And is not a hearing.

The Court: That is correct.

Mr. Wilson: We oppose any protests in this case because [21] it is not a hearing and because it has been determined. Now, there has been complaints served on Mr. and Mrs. Bordenelli, who are present today, stating that they are too close to the church and school and I feel that the Court should not allow any protestants to testify in this case because Mr. and Mrs. Bordenelli are operating under a license at this time. They have been granted it. They had a previous hearing with opportunity for the protestants to be heard and this hearing is a matter, strictly an order to show cause why they should have the license revoked and that being the case we have admitted that we are within a certain distance from the school or church and that issue having

been resolved under a previous hearing. It is purely a matter of law on which the Court should decide and that any testimony as to protesting the license would be irrelevant at this time.

The Court: I am inclined to agree that you are right and the Court was wrong, now that you have refreshed my recollection. This is up on order to show cause and that being the case I think you will agree with that, wouldn't you, Mr. Kirkland?

Mr. Kirkland: Yes, your Honor.

The Court: I overlooked that point and I am in error. You may proceed. Now, I believe, that being the case, the order to show cause, the Government is the moving party so may I hear you first, Mr. Kirkland.

Mr. Kirkland: Your Honor, I don't have the——

The Court: Just a moment, please. I hope that the [22] witnesses in the audience understand the Court's position. I feel that counsel is right—Mr. Wilson is right and I am in error because this comes up on an order to show cause, as I pointed out, and I tell you that just to explain my position so you don't think I am precluding you from testifying in respect thereto. Very well, Mr. Kirkland, I am sorry to interrupt you.

Mr. Kirkland: I believe the exact date His Honor has already stated—I don't have the file before me and I don't know the exact date that Judge Folta denied the—issued an order revoking the license. I do know that the file reflects a minute order by Judge Folta denying permission to reopen their application. So on behalf of the Government we

contend that what was the license then became dead, and a license can only exist as long as the Government grants it. Under the statute a license shall be issued for no greater period than one year. When this license was revoked there was nothing there and there was a minute order of the Court refusing to allow the applicants to reopen the matter. There is nothing at this time. Once it is dead it comes under the existing law and then being too close to the school, which is going into the previous argument—meaning the word “renewal” and I don’t feel it is necessary to say any more on that point.

The Court: Do you have a copy of counsel’s brief in this case?

Mr. Kirkland: No, sir, I don’t have a copy of counsel’s [23] brief. I don’t have anything.

The Court: Well, there was a brief filed in December of 1953, the history of the matter. The brief of counsel reflects that on the 21st day of July, 1953, Judge Cooper signed a license for the applicants, said it operated there a liquor establishment until the 12th day of October, at which time Judge Folta revoked said license. I think that gives you the time, counsel. Very well, then, Mr. Wilson, what have you to say in response thereto?

Mr. Wilson: If it please the Court, this case will be—I don’t know which case will decide or whether you will decide all these cases at the same time, but it hinges a great deal on the decision that you will render in the Kelly cases from Naknek.

The Court: That is right, it is the same question exactly.

Mr. Wilson: First, the Kelly cases preceded this case and I relied on the same basis of law for my argument previous to this time and with the light on that particular case——

The Court: Now, in that case, I point out to you, the facts are a little different in the Kelly case. As I recall there was a ruling last fall by the Court, the first afternoon this Court was on the bench and the Court didn't have a good opportunity to go into it too well, however, the license was not reissued during the month of December. The licenses were coming over this Court's desk at the rate of between 25 and 50 a day and it is a physical impossibility for this Court to go in and determine [24] whether or not the applicants were entitled to a license. The Court relied entirely upon the Clerk of the Court, who was Mr. M. E. S. Brunelle. Mr. Brunelle passed the license. The Court didn't even read it, didn't have time to read it as to the facts, but the facts in this case are a little different.

Mr. Wilson: My purpose in bringing that to your attention was that you have continued that case giving Mr. Hughes time to look into the transcript and to show that he had brought the proper facts to the attention of the Court.

The Court: Hear me out, please. In that respect it is a little different here, however, it does effect you in part. There is a possibility of it being in contempt of court for one counsel to bring up the same application before another court when that once has been determined.

Mr. Wilson: For that reason I wonder if the

court wishes to continue this matter to be argued at the same time Mr. Hughes——

The Court: No, I do not. I would like to have it heard.

Mr. Wilson: In that case I would like to correct one statement you made and that is that this was not heard in January, 1954, but was heard in December, 1953.

The Court: Very well.

Mr. Wilson: I believe the license was granted on December 31, 1953. Now, we are not necessarily relying on anything that happened in the Kelly case and I wish to point out to [25] the court if he wishes to refer to the record, transcript, that I brought to the court's attention that this case was very involved, having involved at least Judge Dimond, Judge Cooper and Judge Folta, and yourself, and several attorneys, and that ordinarily these licenses are okayed by the Clerk's office and sent in for your signature and where they are okayed by the Clerk—they are more or less routine—and you don't view the matter. I brought that to the attention of the Clerk's office and requested that we have a hearing in the court. I put the applicant, Mr. Tony Bordenelli, on the stand. I showed that he had properly done everything necessary in his application for a second license under the same establishment in the same location. That being the case, it is our contention—and I also brought to the court's attention the fact of all these previous signature orders and revocations and what we had done and presented it to the

court. It was shown, and the matter, I feel, was properly decided upon that Mr. and Mrs. Bordenelli had a license existing during part of the year 1953, and then revoked that license and extinguished the rights thereof until the end of December 31, 1953.

Now, we submit, your Honor, we had the right to file for a second license and we did so in a brief that was filed supporting that contention. We did so under the new statute which permitted anyone authorized by law to sell intoxicating liquors subsequent to March 23, 1949, in a building that was authorized by law, would have the opportunity to apply for a reissue, calling it [26] what you will, another license, a reissue or renewal, but that gives the right under this exception for the applicants to reinstate themselves under this new law. Although, had they not been doing business prior to that time, subsequent to 1949, had they not been doing that business, they would be deprived of getting a license because the distance allowed a place of business to be located near a church or school was changed from 200 feet, I believe, previous, to a distance of one-quarter of a mile. Now, that exception of the rule brought these applicants within that exception. That matter was brought to the attention of the court and he felt—at that time I wanted the matter settled once and for all. We had gone through this matter several times at the expense of the applicants, I might add, a great expense, and I felt in doing so, that they had a right to do that—once and for all. I call attention to the court that the present court reporter was the reporter at that time, and if

the court is inclined to hear the testimony given by Mr. Bordenelli, I believe it will bear out any contention herein and to support my argument. The law was argued before the court at that time.

The Court: I have no reason to doubt you, counsel. As a matter of fact——

Mr. Wilson: I feel——

The Court: Hear me out. I said I have no reason to doubt you, but the court could have made an error in his ruling at that time. [27]

Mr. Wilson: I feel, your Honor, that the matter set forth in the complaint here, stating the distance of the church and school involved, that we have sufficiently shown that they are within the exception of the law as provided under the Statute of 1953.

The Court: Chapter 116.

Mr. Wilson: Chapter 116, and I am sure your Honor is thoroughly familiar with that, and I won't labor on that, but I do say that once your Honor has passed upon that, that that matter is in the nature of—or absolutely *res judicata* on that issue.

The Court: I don't share that viewpoint, counselor. Have you any authority on that point?

Mr. Wilson: I support that contention by——

The Court: I think the court has the same right to correct his mistakes as anybody else.

Mr. Wilson: I am merely trying to support my argument and if I am proven wrong—I first shall argue that the court has no right to go back into that. Then I, secondly, contend if he does that he

will find that the law sufficiently supports our contention that these applicants are within the exception as set out in that statute. Now, if I may make a point here. Had the Legislature the intention of not protecting those people who have invested money in locations for the purpose of selling liquor, had they not had that intention in mind, why would they not have made that statute apply to those licenses which are already in [28] existence and existing at the time. I would like to point out to your Honor that there are statutes—not in this particular case, now the statute does not say when a person ceases to have an opportunity to renew an application that has expired—but, there are statutes which say that an application cannot be renewed after such and such a date. If that were the case, I would not present such an argument, but in our particular case there is nothing said about that and the only thing we can construe is that the person is allowed to make another application for a license if he were doing business subsequent to March 23, 1949. It would have been just as easy for the Legislature to have said, “those doing business at the time of the enactment of this act,” but it did not say that, and in all good conscience, we cannot allow the statute to upset people who have invested money and who have qualified in every other respect, we cannot arbitrarily deny them the right to do business.

Now, if I may read from 48 C.J.S, Section 157, Intoxicating Liquors, where it states, “It has been held that, if the hearing is before a court, its judgment conclusively determines all points which it is

required to consider, so that these matters are res judicata on an application for a renewal of the license, unless fresh issues are raised remonstrance;”. I submit, your Honor, in this case there are no fresh issues.

Now, I do not know how far the court would like to go back into this case, but I feel that if the court agrees that the [29] issue here is the distance of the church and school, I feel that the argument we have presented is sufficient without going back into the background of the matter. That this has been a case in which is usual in the liquor cases, there is much conflict and interest in the conflict of rules and regulations and procedural matters, and for that reason I feel that if the court is so inclined that I would present whatever brief or whatever is necessary on this particular issue, but I do not know the position of the District Attorney. I believe that he has conceded there is no other issue involved in this case and that being the case this must hinge on this provision in the law. It says, “Provided, however, that a license may be reissued for sale of intoxicating liquors at a time subsequent to March 23, 1949.” It says March 23, 1949, instead of saying at the time this statute was enacted. I cannot see how, construing the statute strictly and for the interest of invested interest, I cannot see how we can arrive at any other conclusion than that this license was issued regularly and that there has been no violation, and which I point out to the court, on revocation proceeding such as this, that it is usual that there

has been some violation on the part of the applicants for an order of the district court to take cognizance and revoke the existing license, otherwise, it would be possible for the court to act arbitrarily in the matter if the court was so inclined and I do not intimate that is the case.

The Court: I appreciate that. [30]

Mr. Wilson: No, the applicants herein have set forth an affidavit which controverts the complaint and justifies the court's issuance of the license. In the beginning, I do not know what matters have come before the court at the time this order was served on the applicants, but I do feel that by looking at the file, it is quite natural that the court or the clerk of the court or the District Attorney would arrive at the conclusion that this license was issued irregularly because it states on it that it is a closer distance than a quarter of a mile and not being advised and no transcript of the record being in the file, the court could not readily determine that this matter had properly been brought before the court and to the attention of the court. I would like to point out to the court that if the court is inclined to feel it is discretion of the court to change his mind, this, that this case does not hinge on any other particular case. It is a case which is not likely to arise again and the fact that the license is allowed to continue in existence in accordance with the court's order, which it was, would not in any way affect the court's making a decision in a liquor case wherein the decision is based purely on an entirely new application. Now, I call attention to the fact

in the application it says, "Is this a first application or a renewal" and it would indicate that it is the second application and not necessarily following consecutively. Now, I would like to point out to the court that in 48 C.J.S., Section 156 under Rules of Evidence, it is not pertinent [31] except to show that there can be a renewal of license following at a time which there has been a lapse of time wherein the applicants had a license and, "which has expired, or for the restoration or renewal of a license which has been revoked, must be treated as a new application, throwing the burden of proof on the applicant." Well, certainly, it may be treated, for all practical aspects, as a new application, but I submit if it is a new application that it still would come within the exception to the rule which allows the person to be within the distance of a church or school that was allowed during the year 1953.

The Court: Very well. Mr. Kirkland, have you anything to say in reply thereto?

Mr. Kirkland: Yes, your Honor. First of all, counsel has stated—under his construction of Chapter 116 of the 1953 Session Laws, he has construed in the eyes of the investment interest. I think he is highly in error. Such a statute as this should always be construed in the public interest, that is, where you have school grounds and churches within a close area. Now, I contend that upon reading the statute, that the word "reissue" means that it would have to be continuous. Now, the reason I would base it on that is that counsel has claimed that this right goes with the building, that is, that any license and any-

one could come into the same building and get a license even though maybe it is two or three years later. Under the statute——

The Court: The court wouldn't want to hear you on that [32] because the court has a firm opinion that is not true.

Mr. Kirkland: Your Honor, I was trying to bring that out to support the argument to show what the legislative intent was.

The Court: I didn't want to interrupt you, but I wanted you to be certain where the court stood in respect to that argument.

Mr. Kirkland: And under his contention that if it goes to the building——

Mr. Wilson: Your Honor, I don't believe that was my contention.

Mr. Kirkland: I may have been in error. That might have been Mr. Hughes' contention.

The Court: Well, that certainly was discussed by Mr. Hughes. I don't recall Mr. Wilson referring to that, and even if he didn't and you want to argue it, I want to let you know that as far as I am concerned the license is not issued to the building, but to the person.

Mr. Kirkland: I submit when it has been revoked by order of the court that there is no license there and it could not be renewed and that this particular section of the Statute 1953, that the legislative intent is that it is continuous rather than for a break of time, because conditions would change, economic, social and otherwise, where it would not

be desirable if he were allowed to go under such a decision as that. [33]

The Court: Very well, Mr. Wilson, the court would like to have you look into the question of renewal and the question of revocation. I point out to you in advance, there has been several other counsel who have looked into it, and just don't find any law. There have been a few cases, very, very few. I don't want you to get discouraged after you look for the first week or 10 days, but I would like to have you find anything you can to support your position.

Mr. Wilson: Your Honor, there is nothing to the contrary, either.

The Court: That is true, so this court is going to have—establish—and anything you can get to help the court in respect thereto would be appreciated. Now, frankly speaking, I feel that this situation is entirely different than that of Kelly, and I would like—if possible, could you get away for 3 days? If you can't, why, then the court intends to rule on this next Friday.

Mr. Wilson: If you want to rule next Friday, I will write a brief to you by that time.

The Court: I wish you would, because if you don't, the court will have to.

Mr. Wilson: Do I understand you are going to rely upon—do I understand the court to mean I will have to establish *res judicata*?

The Court: Beg your pardon? [34]

Mr. Wilson: Do I understand the court to mean

I will have to establish you have the right to change the order *res judicata*?

The Court: No, the court doesn't feel that has too much merit. If you want to embarrass me upon that point you may do so, but I don't believe you can find the law to support that position; however, there might be some law, but the court believes that over the common weight of the law is that the court does have a right to change positions once he has made a decision in error, and that is my position. Now, if you find some law and want to brief that point, I certainly wouldn't have any objection to it, but I want to advise you in advance the position of the court.

Mr. Wilson: Does the court disagree with the fact if this were not a renewal, were a new license, they would not have a right to apply for another license under this amendment to the Statute?

The Court: That is right.

Mr. Wilson: Then the court will, I hope, leave himself open to changing his mind subject to my brief.

The Court: Well, naturally, if the court didn't want to have your brief, I would have arrived at a decision on it. I wouldn't want to put you to that trouble and worry. I will state this, to be frank with you, that your chances of overruling the court's position at that time are very slim, because this has been argued in three other cases, so I don't want to discourage [35] you too much, but you are going to have to bring in some pretty persuasive law to convince the court that the court did not make an

error in this particular application. Very well, the court will stand in recess until the call of the gavel.

(End of Record.)

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Reporter of the above-entitled court, hereby certify:

That the foregoing is a full, true and correct transcript of the record on appeal in the above-entitled matter taken by me in stenograph in open court at Anchorage, Alaska, on December 29, 1953, and June 25, 1954, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed September 27, 1954. [36]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith

the original papers in my office dealing with the above-entitled action or proceeding, and including specifically the complete record and file of such action, including the bill of exceptions setting forth all the testimony taken at the trial of the cause, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the order of revocation of LB&W License No. 5884, filed and entered in the above-entitled cause by the above-entitled court on July 27, 1954, to the United States Court of Appeals at San Francisco, California.

WM. A. HILTON,
Clerk of the District Court for the Territory of
Alaska, Third Division.

[Seal] By /s/ CARETA BRYANT,
Chief Deputy Clerk.

[Endorsed]: No. 14534. United States Court of Appeals for the Ninth Circuit. Tony Bordenelli and Eyvohn Bordenelli, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed: October 4, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14534

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TONY BORDENELLI and EYVOHN BORDE-
NELLI,

Defendants.

APPELLANTS' STATEMENT OF POINTS

1. The Court erred in finding that the question of renewal of a liquor license had not been considered in granting of the license on the 30th day of December, 1952.

2. The Court erred in holding that the license issued on the 21st day of July, 1953, was not subject to reissue and renewal.

3. The Court erred in reversing its order which was res judicata.

Dated this 16th day of March, 1955.

WILSON & WILSON,

By /s/ T. STANTON WILSON,

Of Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 18, 1955.

No. 14,534

IN THE

United States Court of Appeals
For the Ninth Circuit

TONY BORDENELLI and EYVOHN BORDENELLI,
Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

WILSON & WILSON,

T. STANTON WILSON,

423 Fourth Avenue, Anchorage, Alaska,

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FILED

MAY 24 1955

PAUL P. O'BRIEN, CLERK

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No. 14,534

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TONY BORDENELLI and EYVOHN BORDENELLI,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

JURISDICTION.

This is a proceeding brought by the United States of America against the appellants to have their liquor license revoked. The District Court issued an Order to Show Cause on May 26, 1954 (R. 23) and a hearing was held thereon on June 25, 1954 (R. 68). An order revoking the license was entered July 27, 1954 (R. 44). An appeal was taken on August 20, 1954, by filing with the District Court a Notice of Appeal (R. 46). The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C.A., Section 101, and 35-4-31 A.C.L.A., 1949;

the jurisdiction of this Court on Section 1291 of the Federal Judicial Code, 28 U.S.C.

STATEMENT OF FACTS.

The appellants filed an application, petition and census on March 13, 1953, for a Beverage Dispensary License to operate a liquor establishment at Kenai, Alaska, an unincorporated municipality. A hearing was held May 4, 1953, at which District Judge Dimond presided (R. 35). The District Judge who had presided at the original hearing, Judge Dimond, had since died and the second petition and census were filed June 20, 1953, pursuant to an order signed June 16, 1953, by District Judge Folta (R. 36). The order issuing the Beverage Dispensary License was not signed until July 21, 1953, shortly after Judge Cooper of the Second Division of Alaska arrived to sit temporarily in Anchorage (R. 36). The appellants commenced to operate a liquor establishment in a building approximately 950 feet from a church and 1500 feet from a school (R. 3, 59-60, 63, 65-66). With one exception, it was the liquor establishment the farthest in the community from the church and school (R. 63, 65). One bar was directly across the street from the appellants (R. 67). On October 13, 1953, the appellants were ordered to close their establishment pursuant to an order entered by District Judge Folta revoking the license (R. 37). The license was revoked, presumably, for one or more of the six reasons set out in the Order to Show Cause issued September

5, 1953. The order revoking the license was entered at Juneau (R. 15). It did not state the reason for revocation.

The appellants have never been convicted of any violation or infraction of the Territorial Liquor Laws (R. 67). On October 27, 1953, the appellants filed a motion to re-open the matter (R. 37). This motion was denied by District Judge Folta on December 4, 1954 (R. 37). The appellants on December 7, 1953, filed application for reissuance of their Beverage Dispensary License (R. 3). A hearing was held December 29, 1953 (R. 53). At the hearing it was claimed that the appellants' license should not be reissued for the reason their establishment was located less than a quarter of a mile from a schoolground, which was prohibited by Chapter 116, Session Laws of Alaska, 1953 (R. 54). The appellants argued that they came within the exception included in said statute, for the reason that they had been authorized by law to sell intoxicating liquor in the same building at a time subsequent to March 23, 1949, by virtue of the license issued to them July 21, 1953, which was revoked October 12, 1953 (R. 56-58). An order was entered December 31, 1953, granting appellants a Beverage Dispensary License (R. 7). Appellants again opened their establishment and proceeded to operate it.

On May 26, 1954, an Order to Show Cause why appellants' license should not be revoked was issued (R. 23). A hearing was had June 25, 1954, and argument by the United States Attorney and the attorney for the appellants was heard (R. 68). The argument

was essentially the same as that made at the December 29, 1953 hearing.

The Court wrote a Memorandum Opinion deciding that the license issued December 31, 1953, was issued in violation of Chapter 116, Session Laws of Alaska, 1953, and that the appellants did not come within the exception (R. 35). Order Revoking License was entered (R. 44). From this order this appeal is taken.

SPECIFICATION OF ERROR.

The District Court erred:

2. In holding that the license issued on the 21st day of July, 1953, was not subject to reissue and renewal.

ARGUMENT.

THE COURT ERRED IN HOLDING THAT THE LICENSE ISSUED ON THE 21ST DAY OF JULY, 1953, WAS NOT SUBJECT TO REISSUE AND RENEWAL.

SUMMARY.

The license issued December 31, 1953, was not in violation of Chapter 116, S.L.A., 1953, which increases the distance from schools and churches within which no new licenses may be issued. As the appellants' establishment is within a quarter of a mile of a church and school, it is clear that they were not entitled to the license issued to them December 31, 1953, unless they came within the exception to Chapter 116, S.L.A., 1953, set out in the Summary hereinafter referred to

as "The Exception". The license which the appellants had between July 21, 1953, and October 12, 1953, entitled them to reissue of their original license by virtue of the express provision of the following exception contained in the said statute:

"* * * provided, however, that a license may be reissued for the sale of intoxicating liquor in any building in which such sale was authorized by law at a time subsequent to March 23, 1949."

OPINION BELOW.

The District Judge, in his Memorandum Opinion, stated:

"The sole question to be determined by the Court in this matter is: Are the applicants entitled to a renewal of their liquor license for the year 1954, as contemplated by Section 35-4-15 of the 1949 Compiled Laws of the Territory of Alaska, as amended by Chapter 116, 1953 Session Laws, after the 1953 license was once issued and later revoked" (R. 38).

The appellants believe that this properly states the chief question below as well as the chief question involved in this appeal, with one exception. As both statutes referred to by the Court contain the word "reissue" rather than "renewal", the appellants submit that "reissue", the statutory term, be substituted for "renewal" in the statement of the question. This is a case of first impression.

MAIN ARGUMENT.

The appellants are unable to find reported decisions where the Exception has been applied or cases in other jurisdictions interpreting similar exceptions. This case will create new law in the jurisdiction.

EXCEPTION UNAMBIGUOUS.

The basic principle has been announced time after time, that if the statute is plain, certain and free from ambiguity, a bare reading suffices and interpretation is unnecessary.

Helvering v. St. Louis S. Ry. Co., 84 Fed. 2d 857;

U. S. v. Hartwell, 6 Wall. 395;

United States v. Wiltberger, 5 Wheat. 76;

Ruggles v. Ill., 108 U.S. 526;

Statutory Construction, Crawford, p. 244;

Lewis v. U. S., 92 U.S. 618;

Swarts v. Siegel, 117 Fed. 13;

Sturgis v. Crowin Shields, 4 Wheat. 122;

Southerland Statutory Construction, 3rd Edition, Vol. 2, p. 334.

The Exception is short, concise, and unambiguous. The appellants submit that conducting a liquor establishment under license of the District Court for a period in 1953 comes unquestionably within the wording of the Exception, and that the appeal should be decided without the necessity of going beyond the facts and the wording of the Exception. However, rather than rest here, the appellants will proceed to

examine the Exception to show that the facts definitely come within the express wording of the Exception.

“REISSUE”.

In construing the term “renewal” the Court construed a word contained in neither 35-4-14 A.C.L.A., 1949, nor in the two amendatory acts, Chapter 83, S.L.A., 1949, and Chapter 116, S.L.A., 1953. All three statutes use the term “reissue”. No lengthy discussion need be made here to show that the terms do not have the same meaning. Though the term, “renewal” may imply a necessity of continuity of licenses, the term, “reissue” rather suggests that for some reason the license has ceased to be valid and it is necessary to “reissue” it.

“The prefix ‘re’ denotes * * * 2. again—used chiefly to form words, esp. verbs, of action, denoting in general repetition (of the action of the verb) or restoration (to a previous state) * * *”
Websters New International Dictionary, 2nd Edition, Unabridged, p. 2070.

As the appellants see no substantial question as to the meaning of the term “reissue”, its meaning will not be discussed further.

“BUILDING”.

The license was reissued for the same “building” where sale of liquor was licensed July 21, 1953. This has never been questioned.

“AUTHORIZED BY LAW”.

The term, “authorized by law” in the Exception is clear and unambiguous. The appellants operated a liquor establishment from July 21, 1953, to October 12, 1953, under a license issued by the District Court, after a hearing. In a criminal prosecution for a violation of the liquor law, “without lawful authority so to do” was held to be the legal equivalent of “without first procuring a license”. *State v. Monti.*, 90 Vt. 566, 99 Atl. 264. The fact that their authorization was terminated by an order revoking their license does not mean that they were at no time “authorized by law”. For example, no one would contend that the appellants could have been criminally prosecuted for merely operating their establishment as long as the license was in force. One should give the term “authorized by law” its ordinary meaning rather than create the fiction that the appellants were never “authorized by law”, merely because the license was revoked.

If the first license was properly issued and revocation improper, there can be no question but that appellants were “authorized by law” to sell liquor. The appellants have, at all times, asserted that the first license was properly issued and should never have been revoked. Though it was issued after Chapter 116, S.L.A., 1953, became effective, the appellants contend that having taken all the necessary steps prior to June 30, 1953, the date when Chapter 116, S.L.A., 1953, became effective, their rights under the statute in effect were preserved by the general saving clause statute, 19-1-1, A.C.L.A., 1949. This was urged by

appellants in their brief filed on December 31, 1953 (R. 18-19). There is no dispute that the first license was rightfully issued, if issued under the law in force prior to June 30, 1953.

Whether or not the revocation on October 12, 1953 was proper remains in question. The Order to Show Cause why the first license should not have been revoked stated six reasons why the license should be revoked. No hearing was ever held on the Order to Show Cause. A minute order revoking the license was entered at Juneau on October 12, 1953, by Judge Folta (R. 15). It did not give the reason for revocation. At the hearing held December 29, 1953, prior to the reissuance of the license, Judge McCarrey assumed that the principal reason for the revocation was the location of the appellants' establishment in relation to the school and church and under which law the license was granted (R. 54). However, the record does not show with any certainty why the first license was revoked, so it is impossible to decide whether the revocation was proper or improper.

Assume *arguendo* that the first license was wrongfully issued and was revoked for the reason that it did not comply with the law in force at the time of issuance and therefore never should have been issued. The determination remains not whether it would be wise policy to provide for reissue of the license under such circumstances, but rather whether the legislature has in fact done this.

PURPOSE OF LEGISLATURE.

Not only do the appellants come within the express wording of the Exception, but also their investment is of the type which the legislature sought to protect. The purpose of the legislature in creating the Exception is not difficult to ascertain from reading Chapter 116, S.L.A., 1953. The main purpose of this statute is to increase the distance from schools and churches within which new liquor establishments could not be licensed. The purpose of the Exception to this general provision is to protect the investments of persons "authorized by law, at a time subsequent to March 23, 1949," to sell intoxicating liquors in the same building. The policy to keep liquor establishments a certain distance from schools and churches is counterbalanced by the essential harshness of destroying the investments of those operating going establishments.

There is a further balancing in this case of the interest of the appellants' investment made in relying on the validity of the license and the interest in permitting the Court to correct what it considers to be its past errors. After a hearing, the Court has twice granted the appellants licenses; twice the appellants opened their establishment; twice the Court concluded it should not have issued the license and revoked them. It cannot be said that the harshness to which appellants were thereby subjected was not of the kind the legislature sought to alleviate, but it is a creation of the Exception. The wording of the Exception is broad enough to protect investments of this nature.

CONTRAST WITH AMENDED STATUTES.

In one respect the wording of the Exception differs from the comparable exceptions in the Acts which Chapter 116, S.L.A., 1953 amends, 34-4-15 (3) A.C.L.A., 1949, and Chapter 83, S.L.A., 1949. The Exceptions in the two earlier Acts apply to those authorized by law "at the time of the passing of this Act", while the Exception in Chapter 116, S.L.A., 1953, applies to those authorized by law "at a time subsequent to March 23, 1949". The Legislature had the earlier statutes before it when Chapter 116, S.L.A., 1953, was drafted and when it was determined to change the wording, the Exception makes no requirement that the authorization be continuous. Instead it provides, "at *a* time subsequent to March 23, 1949" (emphasis added). In including within its wording the authorization subsequent to the time of passing the Act it takes in the appellants whose first license was issued July 29, 1953, though Chapter 116, S.L.A., 1953, became effective June 30, 1953. The Exception requires that the authorization be on no particular date, but merely need be some time after March 23, 1949.

LIMITED BY LAST PARAGRAPH OF STATUTE.

The breadth of the Exception is, however, cut down by the last paragraph of Chapter 116, S.L.A., 1953. It provides no license shall be issued after being forfeited by reason of a violation of law. [The record indicates that the appellants have never been convicted

of any violation of the Territorial Liquor Laws (R. 67). The last paragraph is also of assistance in giving content to the Exception which immediately precedes. The logical implication of the last paragraph when read together with the Exception which immediately precedes it is that a license may be reissued if revoked for reasons other than violation of law. The use of the maxim *expressio unius est exclusio alterius* produces the same result. The result is that the last paragraph sets up the only fact situation coming within the broad terms of the Exception, under which a person would not be entitled to reissue of the license.

At the very least, the last paragraph of Chapter 116, S.L.A., 1953, implies that there are some circumstances under which a license revoked for reasons other than "violation of law" could be reissued. The facts here involved present as strong a case for reissue of a revoked license as could be conceived. Most of the difficulties stem from the untimely death of Judge Dimond who first heard the case and the fact that no less than four different judges acted in the case. The new law, Chapter 116, S.L.A., 1953, became effective before another judge could act on the appellants' application. Then came the revocation of the license with no hearing held and no indication of the reason for the revocation, after the appellants had been operating their establishment for several months. After obtaining a second license, following a hearing in which the application of the Exception was argued, appellants again, in good faith, proceeded to operate their establishment when again the license was re-

voked. If, as the last Exception in Chapter 116, S.L.A., 1953, implies, there are situations when a revoked license may be reissued, this must be among them.

CONCLUSION.

For the reasons stated, it is submitted that the order revoking the appellants' second license should be reversed.

Dated, Anchorage, Alaska,
May 16, 1955.

WILSON & WILSON,
T. STANTON WILSON,
Attorneys for Appellants.

No. 14,534

IN THE

United States Court of Appeals
For the Ninth Circuit

TONY BORDENELLI and EYVOHN BORDENELLI,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,
United States Attorney,

LYNN W. KIRKLAND,
Assistant United States Attorney,
Anchorage, Alaska,
Attorneys for Appellee.

FILED

JUL 27 1955

PAUL P. O'BRIEN, CL

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No. 14,534

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TONY BORDENELLI and EYVOHN BORDENELLI,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

**On Appeal from the District Court for the
Territory of Alaska, Third Division.**

BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdictional statement regarding the jurisdiction of the District Court as set forth by appellants is correct.

However, under Section 35-4-13, Alaska Compiled Laws Annotated, 1949, as amended by Chapter 131, Session Laws of Alaska, 1953, the decision of the District Court on hearings on applications for liquor licenses is made final and no appeal is permitted. By Section 292, 48 United States Code Annotated, 48 Stat. 583, it is provided in part as follows:

“No spirituous or intoxicating liquors shall be manufactured or sold in the Territory of Alaska,

except under such regulations and restrictions as the Territorial Legislature shall prescribe, and the legislative power and authority conferred upon the Legislative Assembly of the Territory of Alaska by sections 21-24, 44, 45, 67-73, 79-90, and 145 of this title, shall be, and is, extended to include any legislation pertaining to the manufacture or sale of spirituous or intoxicating liquor within the said Territory, and any provision contained in the said sections, in conflict herewith, is expressly repealed: . . .”

Therefore, appellee moves to dismiss this appeal for the reason that the United States Court of Appeals for the Ninth Circuit does not have jurisdiction in this matter.

STATEMENT OF THE CASE.

The statement of the case as set forth by appellants is substantially correct.

STATEMENT OF POINTS RELIED ON.

I.

The Court did not err in holding that the license issued on the 21st day of July, 1953, and revoked on the 12th day of October, 1953, was not subject to re-issue and renewal.

ARGUMENT.

- I. THE COURT DID NOT ERR IN HOLDING THAT THE LICENSE ISSUED ON THE 21st DAY OF JULY, 1953, AND REVOKED ON THE 12th DAY OF OCTOBER, 1953, WAS NOT SUBJECT TO REISSUE AND RENEWAL.

Appellants did not appeal the order of October 12, 1953, revoking their license and should not be allowed to do so in this proceeding, however, to answer appellants' argument, we wish to point out that appellants in their brief on page 4 admit that their establishment is within a quarter of a mile of a church and a school and that they are not entitled to the license issued to them December 31, 1953, unless they come within the exception to Chapter 116 SLA 1953, as set out in counsel's brief on page 5. Appellants only claim to rights under the exception is the license to sell intoxicating liquors that appellants held from July 21, 1953, until its revocation on October 12, 1953.

An examination of the record relating to the license issued July 21, 1953, indicates the following: That on the 13th day of March, 1953, the applicants filed an application for a L B & W license under file No. 3750. That a hearing on said application was commenced on the 4th day of May, 1953 (R. 35). On May 27, 1953, applicants filed a motion to withdraw their application without prejudice to make another application for reasons as set forth in the record, one of them being that the census and consent petition did not comply with the law (R. 36). That on the 16th day of June, 1953, the Court signed an order permitting the applicants to withdraw the pending application without prejudice to the rights of the applicants to file a new applica-

tion and petition (R. 36) and on the 29th day of June, 1953, by affidavit, one of the applicants Tony Bordenelli filed a supplemental consent petition. On the 21st day of July, 1953, a license was issued by the Honorable J. Earl Cooper, District Judge, of Nome, Alaska (R. 36). That on September 5, 1953, an order to show cause why the license should not be revoked was signed by the Honorable George W. Folta, District Judge, for the reason that in the issuance of the license the law was not complied with in the following particulars:

1. No application was on file, the original having been denied and withdrawn.
2. No hearing upon any application was set.
3. The protestants were not notified.
4. The Court failed to consider any application before granting the license.
5. The Court failed to consider the protest on file.
6. The census and list of persons consenting to the issuance of the license failed to comply with the law which became effective June 30, 1953 (R. 37).

On October 12, 1953, the said license was revoked for the reasons stated in the order to show cause (R. 37). There was no appeal from that order.

The record clearly indicates that at the time of issuance of the said license on July 21, 1953, that there was no application on file and that the Court, therefore, could not have considered any application at the time of issuing the license. The real question to be decided by this Court is, Does the holder of a liquor license that has been issued without compliance to

Territorial statutes give the holder of that license such rights as to bring them within the exception to Chapter 116 SLA 1953? Appellee contends that a license to sell intoxicating liquors, if not issued in accord with the laws regulating the issuance of liquor licenses, could not be construed as giving the licensee a legal right to sell liquor and by no stretch of the imagination, could it be said that the licensee or premises were "authorized by law" to sell intoxicating liquors. In regulating the licensing and sale of intoxicating liquors, the legislature has prescribed certain requirements which must be complied with before a license can be issued. Section 35-4-13, ACLA 1949, sets forth the requirements and the contents for the application of a liquor license. The statute states that it must be shown in the application that certain requirements such as consent of residents over the age of twenty-one (21) years residing within a certain area have consented to the issuance of the license and that no license shall be granted in the absence of such evidence. The statute also provides that at the time set for the hearing, that the Court shall consider the application and any protest that may be filed against the same and shall also hear the applicant or others appearing in connection with the matter and give its judgment which shall be final. Section 35-4-13 was amended by Chapter 131 SLA 1953, in numerous aspects concerning the issuance of a license to sell intoxicating liquors, however, the act amending 35-4-13, retained the provision for an application and also retained the sentence stating "that no license shall be granted in the absence of the evidence of the con-

sent of citizens over the age of twenty-one (21) years residing in a certain area.” The amendatory statute also retained the section pertaining to the hearing, “The Court shall consider the application and any protest that may be filed against the same and shall also hear the applicant or others appearing in connection with the matter, and give its judgment, which shall be final.”

The legislature in regulating the issuance of liquor licenses prescribed certain requirements to be complied with before the Court could issue a license to sell intoxicating liquor. Those requirements were not complied with and the Court was without jurisdiction to issue the license, the action of the Court was void. In *State v. Moore*, 67 W.Va. 559, 68 SE, 177, a license to sell intoxicating liquor had been granted to one U. S. Moore. A statute of West Virginia required that an applicant for a license to retail intoxicating liquors should file a petition with the Clerk of the County Court “at least thirty (30) days before the session of said Court at which the same may be heard.” Moore filed his petition with the Clerk of the County Court and a hearing was held twenty-six (26) days after the petition was filed. The Court granted the license to Moore and Moore was indicted, while holding this license, for selling intoxicating liquor without a license. Moore was convicted and appealed on the ground that when the Court grants a license, it is not void, but good until revoked and that no collateral attack could be made upon it. The Supreme Court of Appeals of West Virginia held: That with-

out compliance with the statute in the filing of the petition for the time fixed, the County Court had no jurisdiction or power to act, and that the action of the Court was void and afforded no protection to the holder of the license as a defense to the indictment for selling intoxicating liquors without a license. For other authorities that hold that statutory requirements for the issuance of liquor licenses are jurisdictional and must be complied with in all respects, see *Muncy v. Collins, et al.*, 132 Iowa 50, 106 NW 262; *State v. Seibert*, 97 Mo. App. 212, 71 SW 95; *Pisar v. State*, 56 Nebraska 455, 76 NW 869; *Black on Intoxicating Liquors* #158. The record in this case indicates that there was no application on file at the time of the issuance of the said license on July 21, 1953 (R. 36 and 37). The weight of authority holds that statutory requirements must be met and in the event they are not, the action of a Court in issuing a license is completely void and without effect. If the Court were without jurisdiction to issue the license on July 21, 1953, then the license issued July 21, 1953, gave the applicants no rights whatsoever and would not bring the applicants within the exception to Chapter 116 SLA 1953, because the applicants were at no time "authorized by law to sell intoxicating liquors."

Appellant on page 8 of his brief asserts that the license issued July 21, 1953, was properly issued even though it was issued after Chapter 116 SLA 1953, became effective. Chapter 116 SLA 1953 provided that no license should be issued for the sale of

intoxicants in any building within one quarter of a mile of any church building or school ground where such church building or school ground is located outside a corporate municipality. Appellants' establishment was located less than one quarter of a mile from a church (R. 3, 59-60, 63, 65-66). Effective date for Chapter 116 SLA 1953, controlled by the Organic Act of the Territory of Alaska, being June 30, 1953. Appellants could have obtained no rights under the General Savings Clause statute, 19-1-1 ACLA 1949, as the record indicates that the application filed on March 13, 1953, was withdrawn and no new application filed (R. 36 and 37). Assume arguendo that the application filed March 13, 1953, had not been withdrawn and had remained on record. Appellants by the mere filing of their application on March 13, 1953, obtained no such right as is mentioned in section 19-1-1 ACLA 1949. The following statement is found in 48 CJS Intoxicating Liquors Section 99, at page 223, "A liquor license is a temporary permit or privilege issued in the exercise of the police power of a state to engage in a specified liquor business which would otherwise be unlawful. It is a matter of privilege rather than of right, personal to the licensee, and is neither a right of property nor a contract or contract right in the legal or constitutional sense of those terms."

CONCLUSION.

The Court did not err in holding that the license issued on the 21st day of July, 1953, was not subject to reissue and renewal for the reason that the Court in issuing the said license on July 21st, 1953, acted without jurisdiction and there was, therefore, nothing in existence to be reissued or renewed.

Dated, Anchorage, Alaska,
July 15, 1955.

Respectfully submitted,

WILLIAM T. PLUMMER,

United States Attorney,

LYNN W. KIRKLAND,

Assistant United States Attorney,

Attorneys for Appellee.

No. 14535

**United States
Court of Appeals**
for the Ninth Circuit

KRIS PETROLEUM, LTD., a Corporation, and
KRIS PETROLEUM, INC., a Corporation,

Appellants,

vs.

WESLEY STODDARD, LITTLE VALLEY OIL
CO., a Corporation, and TED ERDMANN,

Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

FILED

JAN 26 1955

PAUL P. O'BRIEN,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Counsel for Appellee, Ted Erdmann:

LeCOCQ, SIMONARSON and DURNAN,
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Box 631,
Lynden, Washington.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. C-140

WESLEY STODDARD and LITTLE VALLEY
OIL CO., a Utah Corporation,

Plaintiffs,

vs.

KRIS PETROLEUM, LTD., a Foreign Corpora-
tion, and KRIS PETROLEUM (Washing-
ton), INC., a Corporation,

Defendants.

AMENDED COMPLAINT

Come now the above-named plaintiffs and for
cause of action against the defendants state and
allege:

I.

That the plaintiff, Little Valley Oil Co., is a cor-
poration organized and existing under the law of
the State of Utah, and that its license fees have been
paid; that said corporation is a part owner of one
certain drilling rig the management and control of
which it had, at all times hereinafter mentioned,
given to the plaintiff Wesley Stoddard.

II.

That the plaintiff, Wesley Stoddard, is the other
part owner of said drilling rig, and at all times
hereinafter mentioned acted on behalf of himself

and as agent of Little Valley Oil Co., as pertains to its ownership interest in said drilling rig.

III.

That the defendant, Kris Petroleums (Washington), Inc., is and was at all times hereinafter mentioned a corporation organized and existing under the laws of the State of Washington with corporate office at the Beyers Bldg., Seattle, Washington; that at all times hereinafter mentioned it acted on its own behalf and as agent of the defendant, Kris Petroleum, Ltd.; that the said corporation was filed with the Secretary of State of the State of Washington, on the 28th day of September, 1953, and that the incorporators and first directors of said corporation serving as such at all times hereinafter mentioned were:

Raymond Shaw, 827 Rogers Bldg., 470 Granville St., Vancouver, B. C.

George N. Lusch, Beyers Bldg., Seattle, Washington.

Rachel J. Lusch, Beyers Bldg., Seattle, Washington.

Yvonne L. Yarno, Beyers Bldg., Seattle, Washington.

Hugh Henry Roberts, 827 Rogers Bldg., 470 Granville Street, Vancouver, B. C.

IV.

That the defendant, Kris Petroleum, Ltd., is an alien corporation and had, at all times hereinafter

mentioned, its corporate office at 827 Rogers Bldg., 470 Granville Street, Vancouver, B. C.

V.

That on or about the 15th day of April, 1953, plaintiffs commenced to furnish a drilling rig and gear and other customary drilling material, and to perform supervisory labor upon an oil and/or gas well of the defendant, Kris Petroleum, Ltd., located in Whatcom County, Washington, pursuant to written agreement dated April 1st, 1953, and oral agreement supplemental thereto entered into on or about the 15th day of April, 1953.

That a copy of the said written agreement is attached hereto, marked Exhibit "A" and by such reference made a part hereof.

That the said oral agreement provided that in addition to the material and labor to be supplied under the provisions of the said Exhibit "A" the plaintiff, Wesley Stoddard, was to contract for all other necessary equipment in his own name as an accommodation to defendant, Kris Petroleum, Ltd., which was not authorized to do business in the State of Washington; that defendant, Kris Petroleum, was to pay for said obligations or reimburse Wesley Stoddard therefor as soon as they were incurred.

That there was a balance due on account thereof on July 6, 1953, of \$9,980.70, all as more particularly appears in the itemized list marked Exhibit "B" attached hereto, and by such reference made a part hereof; that the defendants either paid said

accounts or by agreement removed plaintiffs, their drilling rig and equipment, from liability thereon, except the sum of \$3,627.15 on account of rentals and except the sum of \$468.78 on account of taxes to the State of Washington, all of said material and labor being supplied at the special instance and request of the defendant, Kris Petroleum, Ltd., as aforesaid, from April 15, 1953, to July 6, 1953.

VI.

That the reasonable value of said materials furnished and labor performed by said plaintiffs for which they have made due demand and not been paid is the sum of \$3,627.17.

VII.

That on the 1st day of October, 1953, plaintiff caused to be filed in the office of the auditor of Whatcom County, Washington, under Auditor's file number 761965, his Claim of Lien, a copy of which is attached hereto and marked Exhibit "C," and by such reference made a part hereof.

VIII.

That it was necessary for plaintiff to employ counsel to prepare said notice of claim of lien and to record the same; that the reasonable value of counsel services for said preparation was and is \$10.00, and cost of recording was \$1.75; that the sum of \$800.00 is a reasonable sum to be allowed said plaintiff for attorney's fees for the foreclosure of this lien.

For a Second Cause of Action, Plaintiffs allege:

I.

Restate and reallege paragraphs I, II, III and IV of their first cause of action:

II.

That on or about the 18th day of October, 1953, plaintiffs commenced to furnish a drilling rig and gear and to perform supervisory labor upon an oil and/or gas well of the defendants, Kris Petroleum, Ltd., and Kris Petroleums (Washington), Inc., in Whatcom County, Washington, said well being the same as specified in plaintiffs' first cause of action herein, pursuant to an oral agreement entered into on or about the 18th day of October, 1953, wherein defendants agreed to pay plaintiffs the sum of \$150.00 per day for rental of said drilling rig and gear and supervisory labor, or \$125.00 per day without supervisory labor, all as supplemental to and based upon the written agreement of the parties dated April 1, 1953, herein attached and referred to as Exhibit "A"; that said material and labor were furnished at the special instance and request of the defendants as aforesaid from October 18, 1953, to December 2, 1953.

III.

That the reasonable value of said materials furnished and labor performed by the plaintiffs was and is the sum of \$8,050.00; that the defendants have paid to the plaintiffs the sum of \$2,944.24 on account thereof, and that there is due and owing

from the defendants to the plaintiffs the sum of \$5,105.76, for which due demand has been made and no part of which has been paid.

That an account of said materials furnished and labor performed, separately stated, together with the amount paid is attached hereto, marked Exhibit "D," and by such reference made a part hereof.

IV.

That on the 10th day of December, 1953, plaintiff caused to be filed in the office of the Auditor of Whatcom County, Washington, under Auditor's file number 765458, his Claim of Lien, a copy of which is attached hereto and marked Exhibit "E," and by such reference made a part hereof.

V.

That it was necessary for plaintiff to employ counsel to prepare said notice of claim of lien and to record the same; that the reasonable value of counsel services for said preparation was and is \$10.00, and cost of recording was \$1.75; that the sum of \$1,500.00 is a reasonable sum to be allowed said plaintiffs for attorney's fees for the foreclosure of this lien.

For a Third Cause of Action Plaintiff alleges:

I.

Restate and reallege paragraphs I, II, III and IV of their first cause of action.

II.

That on or about the 1st day of April, 1953, defendant, Kris Petroleum, Ltd., agreed with plaintiff

in writing to pay to plaintiff the sum of \$75.00 per day for each day that plaintiffs' rig was standing by the well site of defendants' in Whatcom County, Washington; that plaintiffs' drilling rig was standing by the well site of defendants' in Whatcom County, Washington, from July 7, 1953, to October 17, 1953, inclusive; that there is now due and owing from the defendant, Kris Petroleum, Ltd., to the plaintiffs on account of standby time the sum of \$7,425.00, no part of which has been paid although due demand has been made therefore; that said agreement in writing is attached hereto, marked Exhibit "A" and by such reference made a part hereof; that the sum of \$75.00 per day standby time was subsequent to the date of said agreement confirmed and acted upon by the parties hereto as agreed and reasonable.

Wherefore, plaintiffs pray judgment against the defendants, and each of them, as follows:

(1) For judgment in the sum of \$4,095.93, together with an attorney fee of \$810.00, and costs, on their first cause of action.

(2) For judgment in the sum of \$5,105.76, together with an attorney fee of \$1,510.00, and costs, on their second cause of action.

(3) For judgment in the sum of \$7,425.00, and costs, on their third cause of action.

(4) For judgment decreeing said judgments in their first and second causes of action to be first liens upon the real property herein described, that

the same be sold according to law and the practices of this Court to satisfy said judgments, and the costs of foreclosure.

(5) For such other and further relief as to the Court may seem just and proper in the premises.

/s/ WARD V. WILLIAMS,
Attorney for Plaintiffs.

Duly verified.

Receipt of copy acknowledged.

EXHIBIT "A"

Kris Petroleums, Ltd.
827 Rogers Building
470 Granville Street
Vancouver 2, B. C.

Telephones:

MARine 7027

PACific 8442

April 1, 1953.

W. Stoddard, Esq.,
Ogden, Utah, U. S. A.

Dear Sir:

It is agreed that you will immediately ship a drilling rig, plus all accessories except drilling pipe, to Lynden, Washington, to complete a well which you have inspected. You further state that your drilling rig will reach a depth of at least 3000 feet, and is in good working condition. You will also

agree to supervise this drilling rig personally, and that at all times while it is on the drilling site. The cost to us agreed upon will be \$150.00 per twenty-four hours, drilling time. We are to supply all other necessary equipment and mud and bits, coring equipment, etc., pump, water, labor, fuel. There is no charge to us while the rig is in transit and the cost of stand-by time at the well site shall not exceed \$75.00 per day. You agree to move your rig up immediately and to proceed with the drilling without delay.

If two wells or more have been drilled by you, then the freight back to Ogden, Utah, shall be paid by you. If on the other hand we only drill the one well, then Kris Petroleums, Ltd., do hereby unconditionally and upon demand agree to pay the return freight.

Any monies advanced to you today, except freight charges, shall be deductible from the \$150.00 per day for your drilling rig. Settlement can be made for your rig every fifteen days, or as you prefer it.

This contract is binding on both parties.

Yours truly,

KRIS PETROLEUMS, LTD.

Per:—

/s/ H. H. ROBERTS,

H. H. ROBERTS,

President.

Accepted:

/s/ W. STODDARD.

EXHIBIT "B"

Overshot rental	\$ 93.00
Drill collar rental	600.00
Ralph W. Young, accountant	425.00
Ralph W. Young, telephone	7.35
Iverson Lumber Co., lumber	507.89
Lynden Tribune, printing	30.08
Ekdahl & Seppala, Inc., supplies	11.57
Elliott & Verduin, fuel	47.38
Farmers Equipment Co., supplies	17.15
Industrial Supply Co., supplies	214.70
Van's Hardware, hardware	265.41
Reed & Hinton Motors, supplies	6.83
Republic Supply Co., supplies	18.84
Charles Stoddard	7.50
J. H. Shelly	16.50
Northwest Welding Co., welding	742.66
Standard Oil Co., fuel	38.76
Brooks Lumber Co., lumber	58.92
Falcon Products Co., supplies	261.45
R. E. Cole, mileage	29.66
National Supply Co., supplies	2.69
Telephone bill	189.49
Lynden Tribune (Judsons' bill)	2.47
Howard Cooper Corp., supplies	166.56
R. E. Cole, tank rental	262.50
Multi-Products Engineering Co., supplies	25.62
Automotive Parts Service, supplies	29.82
Lynden Department Store, supplies	9.95
Lynden Transfer, Inc., service	61.98
Bowen Fishing Tool Co., supplies	151.48
Puget Sound Power & Light, light	48.81
Associated Oil Field Rentals, supplies	100.00
Tax Commission, State of Wash., taxes	468.78*
Net rig rentals, Wesley Stoddard	3,627.15*

 \$9,980.70

(*Denotes unpaid accounts for which defendants are liable.)

EXHIBIT "C"

761965

Claim of Lien

Wesley Stoddard, Claimant, vs. Kris Petroleum, Ltd., a British Columbia Corporation, and Evergreen Gas & Oil Co., a Washington Corporation,

Notice Is Hereby Given:

That on or about the 15th day of April, 1953, Wesley Stoddard, at the request of Kris Petroleum, Ltd., a British Columbia corporation, commenced to perform labor and supply materials to be used upon the following described real property situate in the County of Whatcom, State of Washington, to wit:

The NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 31, Township 41, Range 3 E. of W.M.

and to perform labor and furnish materials to be used upon all of the gas and/or oil rights and interests situate in and as a part of the following described real property situate in the County of Whatcom, State of Washington, to wit:

Township 40, Range 3 E. of W.M.; Township 40, Range 2 E. of W.M.; Township 41, Range 2 E. of W.M.

of which property the owner or reputed owners are Kris Petroleum, Ltd., a British Columbia Corporation, and Evergreen Gas & Oil Co., a Washington corporation, the performance of which labor and

furnishing of which materials ceased on the 6th day of July, 1953; that said labor performed and material furnished was of the value of \$13,532.85, for which labor performed and material furnished the undersigned claims a lien upon the property herein described for the sum of \$13,532.85.

/s/ WESLEY STODDARD,
Claimant.

State of Washington,
County of Whatcom—ss.

Wesley Stoddard, being sworn, says: That I am the claimant above named; I have heard the foregoing claim read and know the contents thereof, and believe the same to be just.

/s/ WESLEY STODDARD.

Subscribed and sworn to before me this 30th day of September, 1953.

[Seal] /s/ WARD V. WILLIAMS,
Notary Public in and for the State of Washington,
Residing at Lynden.

Received for record at 3:24 p.m., Oct. 1, 1953, at request of Ward Williams. Will D. Pratt, Auditor, Whatcom County, Washington

EXHIBIT "D"

Rental charges:

Oct. 18-24	\$1,050.00
25-31	875.00
Nov. 1-7	875.00
17-24	1,050.00
Nov. 25-Dec. 1	1,050.00
Dec. 1, one day	150.00

	\$5,050.00
Moving rig	3,000.00

	\$8,050.00
Paid by Kris Petroleums (Wash.)	2,944.24
Amount due	\$5,105.76

EXHIBIT "E"

765458

Claim of Lien

Wesley Stoddard, Claimant, vs. Kris Petroleum, Ltd., a British Columbia Corporation; Kris Petroleum (Washington), Inc., a Washington corporation, and Evergreen Gas & Oil Co., a Washington corporation,

Notice Is Hereby Given:

That on or about the 18th day of October, 1953, Wesley Stoddard, at the request of Kris Petroleum (Washington), Inc., a Washington corporation, commenced to perform labor and supply materials to be used upon the following described real prop-

erty situate in the County of Whatcom, State of Washington, to wit:

The NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 31, Township 41, Range 3 E. of W.M.,

which real property is purportedly owned by I. H. Heppner and Jane Doe Heppner, and the gas and oil interest therein are owned by said corporations, and to perform labor and furnish materials to be used upon all of the gas and/or oil rights and interests situate in and as a part of the following described real property situate in the County of Whatcom, State of Washington, to wit:

Township 40, Range 3 E. of W.M.; Township 40, Range 2 E. of W.M.; Township 41, Range 2 E. of W.M.

of which property the owners or reputed owners are Kris Petroleum, Ltd., a British Columbia corporation; Kris Petroleum (Washington), Inc., a Washington corporation, and Evergreen Gas & Oil Co., a Washington corporation, the performance of which labor and furnishing of which materials ceased on the 2nd day of December, 1953; that said labor performed and material furnished was of the value of \$8,050.00, of which \$2,944.24 has been paid, leaving a balance for which the undersigned claims a lien upon the property herein described for the sum of \$5,105.76.

/s/ WESLEY STODDARD,
Claimant.

State of Washington,
County of Whatcom—ss.

Wesley Stoddard, being sworn, says: I am the claimant above named; that I have read the foregoing claim, know the contents thereof, and believe the same to be just.

/s/ WESLEY STODDARD.

Subscribed and sworn to before me this 10th day of December, 1953.

[Seal] /s/ WARD V. WILLIAMS,
Notary Public in and for the State of Washington,
Residing at Lynden.

Received for record at 2 p.m., Dec. 10, 1953, at request of Ward Williams. Will D. Pratt, Auditor, Whatcom County, Washington.

[Endorsed]: Filed July 27, 1954.

[Title of District Court and Cause.]

NOTICE OF APPLICATION TO
INTERVENE

To: Wesley Stoddard, Plaintiff; Ward V. Williams, his attorney; Kris Petroleum, Ltd., Kris Petroleum, Inc., and George N. Lusch, their attorney:

You will please take notice that on Tuesday, the 27th day of July, 1954, at 2:00 o'clock p.m., of said day, or as soon thereafter as counsel can be heard,

at the courtroom of the above-entitled court, at the Post Office Building, in Bellingham, Whatcom County, Washington, the above-named defendant-intervener will move the Court for an order directing that he be permitted to intervene and to prepare and file his complaint in intervention and for such other and further order as to the Court may seem just.

Said application will be made and based upon this notice, and the application of the intervener's attorney, a copy of which is served herewith, and upon the pleadings, papers, records and files in this action.

Dated this 14th day of July, 1954.

LeCOCQ, SIMONARSON &
DURNAN,

Attorneys for Intervener.

Receipt of copy acknowledged.

[Endorsed]: Filed July 23, 1954.

[Title of District Court and Cause.]

APPLICATION OF TED ERDMANN
TO INTERVENE

Comes Now Ted Erdmann and desiring an order to intervene in the above-entitled cause, shows to the Court the following:

(1)

That the above-entitled suit is an action wherein two alleged causes of action seek to foreclose labor

and material liens upon property described as the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 31, Township 41, Range 3 E. W.M., and Township 40, Range 3 E. W.M.; Township 40, Range 2 E. W.M.; Township 41, Range 2 E. W.M., said suit being filed on the 3rd day of June, 1954.

(2)

That your petitioner, Ted Erdmann, has a lien for labor performed upon the same oil well, listing same as being on the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 32, Township 41, North of Range 3 E. W.M.

(3)

That the description contained in the lien referred to by the petitioner refers to the same oil well as is now being foreclosed in this action.

That it is necessary for the proper foreclosure of your petitioner's lien that he be added as a party hereto.

Wherefore, your petitioner prays an order of this court permitting him to intervene and to prepare and file his complaint in intervention.

LeCOCQ, SIMONARSON &
DURNAN,

Attorneys for Ted Erdmann.

Duly verified.

[Endorsed]: Filed July 14, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS APPLICATION OF
TED ERDMANN FOR INTERVENTION
(MOTIONS OF KRIS PETROLEUMS,
LTD., KRIS PETROLEUMS (WASHING-
TON), INC.)

Comes Now the Defendants, Kris Petroleum, Ltd., a foreign corporation, and Kris Petroleum (Washington), Inc., separately and individually but joining in this Motion for convenience and move the Court for an Order to Dismiss the Notice and Application to Intervene herein filed by Ted Erdmann for the reason that the same are fatally defective in the following particulars:

1. Failure to comply with or meet requirements of Rule 7, Federal Court Rules—"Motions" in that it fails to "state with particularity the grounds therefor";

2. Failure to comply with or meet the requirements of Rule 24 (c)—"Procedure";

Lack of Notice to all parties affected;

3. Application "fails to state the grounds therefor";

Application not accompanied by a pleading as required by Rule 24 (c);

4. and 5. Fails to allege facts to meet requirements of Rule 24 (a) or (b) as to show or indicate should be allowed to intervene

either "as a matter of right" or "as permissive."

6. Coming in as an original party so must allege jurisdiction, etc.—also see No. (3).

1. The Application for Intervention alleges a lien against property other than that involved in the principal action for labor without stating whether or not such lien was ever filed; without stating the amount thereof; without stating when or for whom such labor was furnished.

Your Defendants and moving parties therefor have no knowledge of any grounds for intervention and in such a case the Motion should be dismissed where such failure to particularly state is not merely inadvertent and has been objected to by the adverse party. *Steingut vs. Nat'l City Bank (D.C.N.Y.)*, 36 Fed. Sup. 486.

2. The application fails to comply with or meet the requirements of Rule 24 (c) in that no Notice was given to Little Valley Oil Co., Inc.

Rule 24 (c) provides in part: "A person desiring to intervene shall serve a Motion to Intervene upon all parties affected thereby. * * *"

Counsel for the applicant for intervention, Mr. F. W. Durnan, was present in Court on July 13 during the hearing of the Plaintiff's Motion to Remand and Defendants' Motion to make the Little Valley Oil Co., Inc., a Utah corporation, a party, which Motion to make Little Valley Oil Co., Inc., a party was granted. The applicant in intervention

having appeared in Court and having knowledge of the Court's action, is bound by the Order of the Court that the Little Valley Oil Co., Inc., be made a party to this action. Upon such Order the said Little Valley Oil Co., Inc., having been made a party, became a necessary party to be notified of this Application for Intervention and since no Notice was given to Little Valley Oil Co., Inc., and since "intervention may be permitted only on Motion heard on Notice to all parties affected," *Cowan vs. Tipton*, 1 FRD 694, this Motion must be denied.

3. The Application for Intervention further fails to meet the requirements of Rule 24 (c) quoted in part as follows:

"* * * the Motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought * * *."

The applicant for intervention is for all intents and purposes an original party. See in *Re Raabe vs. Glisman & Co., Inc.* (D.C.N.Y.), 7-1 F. Sup. 678.

In the circumstances the application must state the grounds therefor by pleading a valid cause of action including, (a) Jurisdictional requirements as to citizenship; (b) amount involved, and (c) that he has a common question of law or fact against all parties. In each of these requirements his application is defective in that he makes no claim of any nature whatsoever against Stoddard, the Plaintiff; makes no claim against and has failed to notify Little Valley Oil Co., Inc., additional party.

4. Rule 24 (b) (Permissive Intervention) reads in part as follows:

“Upon due application anyone may be permitted to intervene in an action: * * * (2) when applicant’s claim or defense and the main action have a question of law or fact in common. * * *”

We call the attention of the Court to the fact that the Plaintiff Stoddard has claimed in two causes of action that there is due to Stoddard certain sums for labor and materials furnished by him to one or the other or both Defendants. This is an independent and personal claim of his having no question of law or fact in common with the alleged claim of Erdmann. Stoddard seeks to foreclose a lien upon certain described premises whereas Erdmann seeks to foreclose on other described premises. Erdmann has no claim in common with Stoddard but (if at all) has a separate and distinct claim of his own in which Stoddard has no more interest than he himself has in Stoddard’s claim; thus having no claim or defense in common with the main action, intervention will not be allowed under Rule 24 (b), *Dowdy vs. Hawfield*, 198 F. 2d 637 Cert. Den. 342 U.S. 830.

Likewise interveners will not be allowed to bring in entirely new issues which can better be adjudged elsewhere. *Bromley vs. Sobol*, 101 F. Sup 116, and it has been held that one creditor is not entitled to intervene in an action by another creditor when entirely different issues are involved. *First State*

Bank of Chariton, Iowa, vs. City State Bank of Thedford, 10 FRD 424, and permissive intervention was denied where it was not certain that the questions of law and fact presented should necessarily be the same as or confined to those presented on the existing issue. Baltimore and Ohio R. Co. vs. Thompson, 8 FRD 96.

5. The Application for Intervention fails to state any right of intervention under Rule 24 (a) (Intervention as of Right), 24 (a) (3) reads in part as follows:

“When the applicant is so situated as to be adversely affected by a disposition or other distribution of property which is in the custody or subject to the control or disposition of the Court or an officer thereof.”

As heretofore pointed out,

In the alleged lien of the Application for Intervention there is no property described that is involved in the two causes of action for lien foreclosure by the Plaintiff and hence the lien alleged in his application (if it be a lien) does not cover any property before the Court in the principal action and he could not be adversely affected by any disposition of the property in the principal action by any ruling of the Court herein.

6. No Pleading meeting requirements of “Original Party” status:

The applicant or Intervener is for all intents and purposes an Original Party and must be governed

by the rules of Pleading, Jurisdiction, etc., for original parties in the U. S. District Court. See in *Re Raabe vs. Glisman & Co., Inc.* (D.C.N.Y.), 71 F. Sup. 678.

Applicant Petitioner Has Filed No Pleading to Meet the "Original Party" Rule.

Upon the Basis of the Foregoing Stated Grounds for this Motion for Dismissal and the Authorities in support thereof, Defendants Pray an Order of this Court dismissing the Application of Ted Erdmann for Intervention in this proceeding.

GEORGE N. LUSCH,

By /s/ GEORGE N. LUSCH,
Attorney for Kris Petroleums, Ltd., and Kris Petroleums (Washington), Inc., Defendants Herein.

Of Counsel:

/s/ GRAHAM K. BETTS.

Affidavit of Mail attached.

[Endorsed]: Filed July 24, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY—JULY 27, 1954

(Application of Ted Erdmann to Intervene)

Motion to dismiss application of Ted Erdmann for intervention (Motions of Kris Petroleum, Ltd.; Kris Petroleum (Wash.), Inc.).

Application of Ted Erdmann to intervene and

Motion to Dismiss or objections thereto called and argued.

On the Court's own motion, continued until Friday, July 30, 1954, at 1:45 p.m. The Court shortens the time for the service of the Application of Ted Erdmann to intervene. The Court directs that the application be served on all parties.

A true copy.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 140

WESLEY STODDARD and LITTLE VALLEY
OIL COMPANY,

Plaintiff,

vs.

KRIS PETROLEUM, LTD., a Foreign Corpora-
tion, and KRIS PETROLEUM, INC., a Cor-
poration,

Defendants,

TED ERDMANN,

Intervener.

NOTICE OF MOTION
TO INTERVENE

To: Wesley Stoddard and Little Valley Oil Com-
pany, Plaintiff; Ward V. Williams, their attor-
ney; Kris Petroleum, Ltd., Kris Petroleum,
Inc., and George N. Lusch, their attorney:

You will please take notice that on Friday, the 30th day of July, 1954, at 1:45 o'clock p.m., of said

day; or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court, at the post office building, in Bellingham, Whatcom County, Washington, the above-named defendant-intervener will move the court for an order directing that he be permitted to intervene and to prepare and file his complaint in intervention and for such other and further order as to the court may seem just.

Said application will be made and based upon this notice, and the motion and complaint of the intervener's attorney, copies of which are served herewith, and upon the pleadings, papers, records, and files in this action.

Dated this 27th day of July, 1954.

LeCOCQ, SIMONARSON &
DURNAN,
Attorneys for Intervener.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 20, 1954.

[Title of District Court and Cause.]

DEFENDANT'S OBJECTION
TO INTERVENTION

Lack of Jurisdiction of the Intervention, etc.

Defendants Kris Petroleums, Ltd., and Kris Petroleums (Washington), Inc., object further to the or any proposed Intervention by Ted Erdmann in any form:

A. This Court does not have jurisdiction of the proposed Intervention for the following and other stated reasons:

1. One Thousand Six Hundred Three and 04/100 (\$1603.04) Dollars is the amount of claim of lien or value asserted by Intervener applicant. This amount cannot now be changed to comply with Jurisdictional amount.

2. The alleged "lien claim" is on and describes property that is different than that property on which Plaintiff Stoddard Claims a Lien; therefore, the property in intervention is not before this Court.

3. If the lien claim be against Kris Petroleums (Washington), Inc.—it is then against a citizen of Washington and Intervener is a Citizen of Washington. There is no diversity of Citizenship.

Despite objection of Defendants the Court allowed Applicant until Friday, July 30th to present Intervention documents to comply with the law and the rules and the Court shortened the time of Notice therefor accordingly.

The Court, the parties to the Main Action, and the parties to the proposed intervention, must consider the application to Intervene on the basis of the facts and as they are alleged in the Application.

Counsel for Applicant Erdmann in Paragraph (2) of his Application describes property different from that described by Plaintiff Stoddard in his Motion. The property on which Erdmann claims a lien is not before the Court.

Counsel for Intervener delivered to Counsel for Defendants a copy of a purported "claim of lien" allegedly filed in the records of Whatcom County. This alleged "claim of lien" states "for which labor the undersigned claims a lien of \$1603.04."

Title 28 FCA page 182—District Court Jurisdiction — Sec. 1331 — Amount in Controversy:

"The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3000.00, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

By no stretch of the imagination can this amount be enlarged to comply with the jurisdictional limited amount of \$3000.00 exclusive of interest and costs.

The property described by Erdmann "on the N.W. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$ of Section 32, Twp. 41, N of

R 3 EWM'' and the property described by Plaintiff Stoddard in the Main Action NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 31, Twp. 41, Range 3 EWM; Twp. 40, Range 3 EWM; Twp. 40, Range 2 EWM; Twp. 41, Range 2 EWM.

It is clear from the files and records before this Court that the property on which Erdmann claims a lien is not before this Court.

Kris Petroleums (Washington), Inc., is a Washington Corporation. Defendants allege that Erdmann is now and at all material times was a citizen of the State of Washington—therefore there is no diversity of Citizenship.

In the circumstances and based on the objections of Defendants and authorities submitted in behalf of Defendants, the Intervention should not be granted in any form.

Respectfully submitted,

LAW OFFICES
GEORGE N. LUSCH;

/s/ GEORGE N. LUSCH,
Attorneys for Defendants Kris Petroleums, Ltd.,
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

Affidavit of Mail attached.

[Endorsed]: Filed July 29, 1954.

[Title of District Court and Cause.]

AMENDED MOTION TO INTERVENE

Comes Now Ted Erdmann and desiring an order to intervene in the above-entitled cause shows the Court the following:

(1)

That the above-entitled suit is an action wherein two alleged causes of action seek to foreclose labor and material liens upon property described as the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 31, Township 41, Range 3 E.W.M. and Township 40, Range 3 E.W.M.; Township 40, Range 2 E.W.M.; Township 41, Range 2 E.W.M., said suit being filed on the 24th day of June, 1954.

(2)

That the petitioner, Ted Erdmann, has a lien for labor performed upon an oil well, said claim of lien being filed on the 17th day of November, 1953, claiming as value of said labor the sum of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, and alleging that the labor was performed for Kris Petroleum, Ltd., dba Kris Petroleum (Washington), Inc., the performance of such labor ceasing on the 5th day of November, 1953.

(3)

That the oil well upon which the petitioner performed his labor is one and the same oil well upon which and to whom the plaintiffs rendered services

and supplied materials, and this oil well is being foreclosed in this action.

(4)

That under the laws of the State of Washington, from which originate the petitioner's lien rights, the petitioner cannot bring action to foreclose his lien because of the existence of the above-entitled suit. That the petitioner's lien right will have expired before the above-entitled action shall be resolved and that it is therefore necessary for the proper foreclosure of your petitioner's lien that he be added as a party hereto. That the petitioner is not being represented by any of the present parties hereto and that the judgment of the Court in this cause will bind the petitioner and extinguish his lien rights.

Wherefore, your petitioner prays an order of this Court permitting him to intervene and be added as a party hereto.

LeCOCQ, SIMONARSON &
DURNAN,

Attorneys for Intervenor.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 30, 1954.

[Title of District Court and Cause.]

REPLY TO MOTION TO INTERVENE

(Reply of Defendants Kris Petroleums, Ltd., and Kris Petroleums (Washington), Inc., to Motion to Intervene proposed by Ted Erdmann.)

Defendants Kris Petroleums, Ltd., and Kris Petroleums (Washington), Inc., object and reply to the Motion to Intervene by Ted Erdmann and further object to the, or any proposed Intervention by Ted Erdmann in any form:

A. Defendants have previously objected and without waiving said objections as they are still in a large measure applicable, reallege said objections to the Motion to Intervene:

B. Defendants have previously filed in their Objections:

1. Motion to Dismiss the Application of Ted Erdmann for Intervention.

2. Defendants' Objections to Intervention (Lack of Jurisdiction of the Intervention) and now submit this Reply and further objections without waiving any of the previous objections.

I.

The Court does not have jurisdiction:

The Motion to Intervene dated July 27, 1954, shows on its face an amount claimed as One Thousand Six Hundred Three and 04/100 (\$1603.04)

Dollars; in the circumstances the Court does not have jurisdiction because the jurisdictional monetary amount is lacking.

II.

This Erdmann lien claim is on a different property than that claimed by Stoddard:

Par. 2 of the present Motion relates to an alleged lien purportedly filed on the 17th day of November, 1953. This alleged lien is the same as claimed in the par. 2 of the Application presented July 14, 1954—"That your petitioner, Ted Erdmann, has a lien for labor performed upon the same oil well, listing same as being on the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 32, Twp. 41 N of range 3 E.W.M."

As previously pointed out, Stoddard's lien claim relates to property different than that described by Erdmann, Stoddard's claim relating to: NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 31, Twp. 41, Range 3 E.W.M.; Twp. 40, Range 3 E.W.M.; Twp. 40, Range 2 E.W.M.; Twp. 41, Range 2 E.W.M.

A copy of Erdmann's lien claim is attached to the proposed Complaint of Erdmann.

This phase has been fully answered in our objections on page 2 of "Defendants' Objections to Intervention," previously filed herein.

III.

Replying to par. 3 and the statements therein "is one and the same oil well and this oil well is being foreclosed in this action" is a conclusion of the pleader, a conclusion of law and of fact; also

the Complaint of Stoddard is with relation to his lien and is not foreclosing any "oil well."

IV.

Replying to par. 4 of the Motion to Intervene, the statements of Counsel Durnan that he cannot bring an action to foreclose Erdmann's lien under the laws of the State of Washington because of the existence of this present action in the Federal Court is a conclusion of law and of the pleader and a mistake of law and of fact, especially since the lien claims are on different property.

This Erdmann claim is a separate and distinct action—relating to different property than that described and before the Court by the Claim of the Plaintiff Stoddard.

Neither the Motion to Intervene nor the accompanying pleading show that there is a common question of law or fact in this proposed intervention or in any claim of the intervener herein.

Erdmann can bring his action in the State Court, and judgment in this Court will not be binding on him and will not extinguish his lien rights, if any, especially in view of his admission in his Complaint that the lien claim by Stoddard is superior to the lien claim by Erdmann.

V.

No diversity of citizenship:

Since this present Motion presented the 27th day of July, 1954, and the accompanying Complaint and

lien claim—as well as the alleged lien claim copy furnished Lusch, dated 14 November 1953, claims the work was performed for Kris Petroleums, Ltd., dba Kris Petroleums (Washington), Inc.; since Erdmann and Kris Petroleums (Washington), Inc., are citizens of the State of Washington there is no diversity of citizenship in this intervention and the Court does not have jurisdiction.

It will be noted in the allegations of Erdmann's Motion and the Complaint, and the previous Notice and Application of Erdmann, Erdmann fails to allege that he is a citizen of or a resident of the State of Washington.

VI.

For the reasons set out in the Motion to Dismiss, Defendants' Objection to Intervention, Lack of Jurisdiction of the Intervention, etc., and this Reply, Defendants object to the intervention and submit the intervention should not be granted in any form.

Respectfully submitted,

LAW OFFICES,
GEORGE N. LUSCH,

/s/ GEORGE N. LUSCH.

Attorneys for Defendants, Kris Petroleums, Ltd.,
and Kris Petroleums (Washington), Inc.
Of Counsel,

/s/ GRAHAM K. BETTS.

[Endorsed]: Filed July 30, 1954.

[Title of District Court and Cause.]

COMPLAINT IN INTERVENTION
AND CROSS-COMPLAINT

Comes Now Ted Erdmann, and for his answer to the plaintiff's complaint admits, denies, and alleges:

(1)

Admits the filing of said liens as therein alleged and admits that the lien or liens claimed by the plaintiff are superior to the lien of the intervener upon the property in question, as more fully appears in the cross-complaint hereinafter alleged.

As his complaint in intervention and as a cross-complaint against all parties now named in said action, Ted Erdmann, alleges:

(1)

That the above-entitled cause was removed from the Superior Court of the State of Washington, in and for the County of Whatcom, and the intervener's cause of action would have been a cause in said suit had removal not been made.

(2)

That at all times mentioned in this cross-complaint, and on or about the 4th day of July, 1953, the defendants Kris Petroleum, Ltd., were then the owners, or reputed owners, of the following described oil well, situated in Whatcom County, Washington, to wit: An oil well located in Township

41, Range 3 E.W.M., Whatcom County, Washington, and from July 4, 1953, being on or about said date, until November 5, 1953, were engaged in the drilling and maintenance of said oil well and as such employed and caused to be employed several persons including Ted Erdmann, the intervener herein.

(3)

That on or about the 4th day of July, 1953, at the request of Kris Petroleum, Ltd., the intervener, Ted Erdmann, commenced to perform labor upon the said oil well and that the furnishing of and performance of said labor ceased on the 5th day of November, 1953. That the reasonable and agreed value of said labor so performed was and is the sum of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, no part of which has been paid, although demand for payment has been made.

(4)

That within ninety (90) days after the date of the last day of performance of said labor, to wit, November 17th, 1953, Ted Erdmann, intervener herein, for the purpose of effecting a lien against the oil well herein described, filed, in the office of the Auditor of Whatcom County, Washington, its verified notice of claim of lien, which said lien was thereupon duly recorded in Volume 16 of Liens, page 154, Records of Whatcom County, Washington. That a true, full and correct copy of said notice of claim of lien is attached hereto, marked Exhibit

“A” and made a part hereof. That for the recording of said lien this intervener paid the sum of \$1.25.

(5)

That no part of said amount of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars has been paid, and that no part of the sum claimed in said lien has been paid, and that the lien is now a valid and subsisting lien upon and against the property described therein, and that there is now due and owing to the intervener the full sum of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, together with interest on said sum at six per cent (6%) per annum from November 5, 1953, until fully paid. That said intervener has commenced no other suit or action on account of said amount or on account of its said lien, and that all the property hereinabove mentioned and described is necessary for the convenient use and operation and that the sum of Five Hundred Twenty-Five and No/One Hundred (\$525.00) Dollars is a reasonable sum to be allowed this intervener as and for an attorney's fee on the foreclosure of its said lien.

(6)

That on or about the 28th day of September, 1953, or shortly thereafter, Kris Petroleum, Inc., commenced operations at the site of the well which prior to that time had been under the supervision and control of Kris Petroleum, Ltd., but that Kris

Petroleum, Ltd., ceased to operate the construction and drilling upon the incorporation and commencement of operation of Kris Petroleum, Inc., their successor.

Wherefore, Ted Erdmann, prays for judgment as follows:

1. That he have and recover of and from Kris Petroleum, Inc., and Kris Petroleum, Ltd., the sum of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, with interest thereon at the rate of six per cent (6%) per annum from November 5, 1953, until paid. For the further sum of \$1.25 for recording said lien, and for attorney's fees for the foreclosure of said lien, in the further sum of Five Hundred Twenty-Five (\$525.00) Dollars, together with all of the intervener's costs and disbursements in said action.

2. That intervener's said lien be established in the amounts set forth in the paragraph herein above and that the same be foreclosed on the property described in paragraph (2) as a lien upon and against the

Oil well located in Township 41, Range 3
E.W.M., Whatcom County, Washington,

and that the said property last described be sold by the Sheriff of Whatcom County, in the manner provided by law and according to the usual practices of this court in such cases, and that the proceeds be applied to the payment and satisfaction of all liens thereon in their order of priority and that

judgment be given the intervener for any deficiency if said proceeds are not sufficient to pay the intervener's lien, including interest, costs, and attorney's fee.

3. The Intervener prays for such other and further relief as to the Court may seem just and equitable in the premises.

LeCOCQ, SIMONARSON &
DURNAN,

Attorneys for Intervener.

Duly verified.

EXHIBIT A

TED ERDMANN,

Claimant,

vs.

KRIS PETROLEUM, LTD., dba KRIS PETRO-
LEUM (WASHINGTON), INC.

CLAIM OF LIEN

Notice Is Hereby Given that on the first (1st) day of August, 1953, Ted Erdmann, at the request of C. E. Cole, E. D. Judson and Raymond Shaw commenced to perform labor and did perform labor upon one certain oil well, where there had been and was to be certain drilling in said well, with said well located within the N.W. $\frac{1}{4}$ of the S.W.

1/4 of Section 32, Township 41, North of Range 3 E.W.M., of which property the reputed owner is Kris Petroleum, Ltd., dba Kris Petroleum (Washington), Inc., the performance of which labor ceased on November 5, 1953, that said labor performed was of the value of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars, for which labor the undersigned claims a lien of One Thousand Six Hundred Three and Four/One Hundred (\$1,603.04) Dollars in sum on the property herein described.

TED ERDMANN,
Claimant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 30, 1954.

[Title of District Court and Cause.]

ORDER PERMITTING INTERVENTION

Upon application of Ted Erdmann to intervene in the above-entitled cause and to prepare and file his complaint in intervention, the court, having read the application and being fully advised as to the facts,

It Is Therefore Ordered that Ted Erdmann be permitted to intervene in this action by filing his complaint in intervention, said complaint in inter-

vention to be timely filed, to all of which defendants except and their exceptions are allowed.

Done in Open Court this 30th day of July, 1954.

/s/ JOHN C. BOWEN,

Judge.

Presented by:

/s/ F. W. DURNAN,

Of LeCocq, Simonarson &
Durnan.

After hearing copy received in Open Court over objection of Counsel for Kris Petroleum, Ltd., & Kris Petroleum (Washington), Inc.

/s/ GEORGE N. LUSCH.

7/30/54.

[Endorsed]: Filed and entered July 30, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
INTERVENTION COMPLAINT

To: Ted Erdmann, Intervener, and LeCocq, Simonarson & Durnan, his Attorneys; and to Wesley Stoddard and Little Valley Oil Company, Plaintiffs, and their Attorney, Ward V. Williams:

You will please take notice that on Monday, the 23rd day of August, 1954, at 1:45 o'clock p.m., of said day; or as soon thereafter as counsel can be

heard, at the Courtroom of the above-named Court, at the Federal Courthouse, 5th & Madison, in Seattle, King County, Washington, the above-named defendants, Kris Petroleum will move the Court for an order directing that the Complaint and Cross-Complaint in Intervention of Ted Erdmann be dismissed for lack of jurisdiction and failure to state a claim upon which relief sought can be granted and on other grounds as set out in the Motion.

Said application for Order will be made and based on this Notice and the attached Motion, and upon the pleadings, papers, records, and files in this action.

Dated this 16th day of August, 1954.

LAW OFFICES
GEORGE N. LUSCH,

By /s/ GEORGE N. LUSCH,
Attorneys for Defendants, Kris Petroleums, Ltd.,
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

Affidavit of Mail attached.

[Endorsed]: Filed August 18, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS INTERVENTION
COMPLAINT

On Grounds of (Lack of Jurisdiction, Failure to
State Claim, etc.)

Comes Now Defendants, Kris Petroleum, Ltd.,
and Kris Petroleum (Washington), Inc., by and
through counsel of record and move the Court to
Dismiss the Complaint or Intervention of Ted
Erdmann and for such other and further relief
as may be proper.

As grounds it is respectfully alleged:

1. Lack of Jurisdiction:

A. No lien can be foreclosed as action com-
menced after eight months.

B. Jurisdictional amount below Three Thousand
(\$3,000.00) Dollars.

C. No diversity of citizenship alleged or shown.

D. Complaint fails to state a claim upon which
relief sought can be granted.

E. Complaint not against the same property sued
on by Stoddard. Therefore, property not before
the Court. This results in unsecured claim for
One Thousand Six Hundred Three and 04/100
(\$1,603.04) Dollars.

A-1—No Complaint filed and no service of Sum-
mons made within eight (8) months as required,

therefore, lien cannot be foreclosed in this action in behalf of Erdmann. Complaint presented and filed July 30th, 1954.

A "Notice of Application to Intervene" and "Application to Intervene" (without any Complaint) were presented to the Court on or about July 14th or July 17, 1954; however, this does not commence an action either in State Court or Federal Court.

Summons has not been requested nor issued out of the U. S. District Court or out of the Superior Court of Whatcom County.

The Application or Notice to Intervene being without a Complaint attached or submitted did not and does not constitute a Complaint or commencement of an action in the State Court or Federal Court.

The Application and Notice to Intervene (without any Complaint or Summons) presented on July 23, 1954, were defective and on said July 23rd, the Court, over Defendant's objection, instructed Mr. Durnan, attorney for Erdmann, and George N. Lusch, attorney for Defendants, to again appear on the 30th day of July, 1954. The Court further stated that Erdman should by then comply with the rules and law as to Intervention in the U. S. District Court.

On July 30, 1954, Erdmann presented to the U. S. District Court a Motion to Intervene and attached and submitted an alleged "Complaint in Intervention and Cross-Complaint." This filing of the

Complaint on July 30th is actually the first “commencing of the action.”

Even at the present time no summons has been issued or requested. The commencing of the action on July 30 is more than eight (8) months since the filing of the lien; therefore, the intervenor, Erdmann, cannot recover on the face of his Complaint and cannot obtain the foreclosure of his lien. In the circumstances, he would only have an unsecured claim for One Thousand Six Hundred Three and 04/100 (\$1,603.04), which is under the Three Thousand (\$3,000.00) Dollar minimum.

An action is commenced in Washington State Courts under RCW 4.28.010 (Civil Action—How Commenced):

“Civil Actions in the Superior Court shall be commenced by the service of a Summons, as hereinafter provided, or by filing a Complaint with the Clerk of the Court.

“Unless service has been had on the defendants prior to the filing of the Complaint, the plaintiff shall cause one or more of the defendants to be served personally.”

RCW 4.08.190 Parties to Actions (Civil Procedure); Intervention:

“Intervention is made by a Complaint setting forth the grounds upon which the intervention rests, filed by leave of the Court on the ex parte motion of the party desiring to intervene.”

State Statutes and Civil Procedure Intervention also require Complaint as well as Federal Court Rules and U. S. Statutes.

RCW 4.08.200 Practice in Intervention:

“When leave to intervene is given, a copy of the intervener’s Complaint shall be served upon the parties to the action or Proceeding who have not appeared.

“The intervener’s Complaint shall also be served upon the attorneys for the parties who have appeared, who may answer or demur to it as if it were an original Complaint.”

Fed. Rules Digest—Vol. 1—Cum. Sup. page 2:

“Where the applicability of a state statute of limitations is concerned, state law defining commencement of action for that purpose controls over the language of Rule 3. However, a state statute providing that an attempt to commence an action is equivalent to commencement thereof when the summons is delivered to the sheriff, if personal service is made within sixty (60) days, is applicable to action in the Federal Court, the reference to the sheriff being treated as a reference to the United States marshal. *Nola Elec. Co., Inc., v. Reilly*, 14 F.R. Serv. 3.2, Case 1; 93 F. Supp. 164 (D.C. S.D.N.Y.), 1948, 1949.”

B-1—Jurisdictional Amount Below \$3,000.00:

Since the lien claim cannot be foreclosed, the

amount involved is the amount of claim, being \$1,603.04, as appears on the face of the Complaint, the Court is without jurisdiction because the jurisdictional monetary amount is lacking.

C-1—No Diversity of Citizenship Alleged:

Since Erdmann does not mention his residence and since Defendants state his residence is Whatcom County and since Kris (Washington) is a Washington resident, there is no diversity of citizenship that can be alleged or shown by Erdmann to sustain jurisdiction.

D-1—Complaint Fails to State a Claim upon which Relief Sought Can Be Granted:

The lien claim attached to the Complaint and made a part thereof, and which lien Erdmann seeks to have the Court foreclose upon is on a different property than that claimed by Stoddard, Erdmann stating:

NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 32, Twnshp. 41 N of Rng. 3, EWM.

As previously pointed out, Stoddard's lien claim relates to property different from that described by Erdmann, Stoddard's claim relating to:

NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 31, Twp. 41, Rng. 3 EWM, Twp. 40, Rng. 3 EWM, Twp. 40, Rng. 2 EWM, Twp. 41, Rng. 2 EWM.

Therefore, the same property involved in the lien claim of Stoddard is not before the Court in

the attempted intervention of Erdmann and therefore, there is not the same property, not a common question of law or fact, Erdmann has no right to establish or foreclose any lien herein and, further, the Court has no jurisdiction over Erdmann's claim.

The Complaint fails to state a claim, also, for the reason that he does not allege the jurisdictional requirements of an original action sufficient in any respect to sustain jurisdiction or to recover thereon.

Cannot foreclose lien—his time limitation has expired: RCW 60.04.100—Duration of Lien—Limitation of Action:

“No lien created by this chapter binds the property subject to the lien for a longer period than eight (8) calendar months after the claim was filed, Unless an Action Is Commenced Within That Time to Enfore It.”

E-1—Without the Alleged Lien, the Complaint Is Against Property Not Before the Court:

As has been pointed out to the Court previously under the allegations of the Complaint and records and files, the intervener has failed to state a claim upon which relief sought can be granted, and has failed to allege or show a right to intervene “as a matter of right” or to be entitled to intervene as “permissive” because the same property is not before the Court; fails to allege or show common questions of law or fact. The Complaint is defective as to the property.

Wherefore, Defendants, Kris Petroleum, Ltd., and Kris Petroleum, Inc., move the Court to dismiss the intervention Complaint and dismiss the Intervention and move for such other and further relief to which the Court may find them entitled.

LAW OFFICES

GEORGE N. LUSCH,

/s/ GEORGE N. LUSCH,

Attorneys for Defendants, Kris Petroleums, Ltd.,
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

Affidavit of Mail attached.

[Endorsed]: Filed August 18, 1954.

In the District Court of the United States for the
Western District of Washington, Northern
Division

C-140 (Bellingham)

WESLEY STODDARD, LITTLE VALLEY OIL
CO., and TED ERDMANN,

Plaintiff,

vs.

KRIS PETROLEUM, LTD., a Foreign Corpora-
tion, and KRIS PETROLEUM, INC., a Cor-
poration,

Defendants.

ORDER DENYING MOTION TO DISMISS
COMPLAINT OF INTERVENER

This Matter coming on regularly for hearing in open court upon the motion of the Defendants to dismiss the Complaint in Intervention of the Plaintiff Intervener Ted Erdmann, George N. Lusch representing the Defendants, Kris Petroleum, Ltd., and Kris Petroleum, Inc., and F. W. Durnan representing the Plaintiff Intervener Ted Erdmann, and the Court having heard the arguments of counsel and being fully advised in the premises, with the objection of the counsel for the Defendants being noted, and being overruled, and exceptions being allowed defendants; and the Court finding the filing of said intervention complaint and action was timely and that the Court has jurisdiction of them;

It Is Hereby Ordered, Adjudged and Decreed that the Motion to Dismiss said Intervention Complaint be and is Denied and Overruled.

Done in Open Court this 27th day of August, 1954.

/s/ JOHN C. BOWEN,
Judge.

Presented by and Approved:

/s/ F. W. DURNAN,
Counsel for Plaintiff
Ted Erdmann.

[Endorsed]: Filed August 27, 1954.

[Title of District Court and Cause.]

ORDER ON MOTIONS TO DISMISS A/C LACK
OF JURISDICTION, FAILURE TO STATE
A CLAIM, ETC.

Be It Remembered that on this the 27th day of August, 1954, in Open Court, in due order, came on to be considered the Motion to Dismiss Intervention Complaint by Defendants Kris Petroleums, Ltd., a foreign Corporation, and Kris Petroleums (Wash.), Inc.; the Motions being to the Complaint in Intervention and Cross-Complaint of said Intervener Ted Erdmann.

On July 30th, 1954, the Court, after due setting on written Motions and Oral Argument granted

Leave to Intervene to Ted Erdmann, over objections and exceptions of Defendants; and the Court then on said July 30th Ordered the "Complaint in Intervention and Cross-Complaint" of Ted Erdmann filed in this Court in this Action; also over the objections and exceptions of said Defendants;

On August 27, 1954, in Open Court on Written Motions and Oral Arguments the Court refused the Motions to Dismiss said Complaint upon the asserted grounds of Lack of Jurisdiction and Failure to State a Claim upon Which Relief can be granted.

The Court finding the Intervention Application was timely even though it did not present or file or submit at that time a "Complaint" and that even though said Complaint was filed July 30th—(after the 8-month period to commence an action by law to foreclose and establish a lien) that said Complaint is timely filed and States a Claim upon which relief sought can be granted.

The Court finding it has jurisdiction of the Intervention and of the Complaint

It Is Therefore Ordered That the Motions of Defendants are in all things refused and denied

To All of Which the Defendants in open court duly objected and excepted and stated that they will file a formal Notice of Appeal from the Intervention and Refusal of the Motions to Dismiss said Appeal being to the Circuit Court of Appeals for the 9th Circuit of the United States.

Done in Open Court this 27th day of August,
1954.

.....,

Presented and approved by Counsel for Defendants:

/s/ GEORGE N. LUSCH,
LAW OFFICES
GEORGE N. LUSCH,
Counsel for Plaintiff
Intervener.

The foregoing order form was tendered to the undersigned judge for signing by him, but he respectfully declined to do so, on this 27th day of August, 1954.

/s/ JOHN C. BOWEN,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed August 27, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE U. S. COURT
OF APPEALS FOR THE NINTH CIRCUIT
FROM JUDGMENT, ACTIONS AND OR-
DERS OF THE U. S. DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

Comes Now Kris Petroleums, Ltd., a foreign corporation, and Kris Petroleums (Washington), Inc., a corporation, as Defendants and give Notice of

Appeal to the U. S. Court of Appeals for the 9th Circuit sitting at San Francisco, California.

At this time the parties of record are:

Wesley Stoddard, not a resident of Washington State, original Plaintiff; and Little Valley Oil Company, a Utah Corporation, Plaintiff, and

Kris Petroleums, Ltd., a foreign Corporation, and Kris Petroleums (Washington), Inc., a resident of State of Washington, Defendants.

Intervener—Ted Erdmann, citizen and resident of State of Washington.

The Notice of Appeal and Appeal being from the Judgment granting Intervention and from the actions and Orders of Hon. John C. Bowen, Judge of said Court:

I. From the Judgment, Order and action finding that the Court has jurisdiction and in finding that the Intervention Complaint was timely filed even though it was filed after the expiration of the eight (8) months period allowed by law for “Commencing of an action to establish and foreclose a lien” and in finding that the Complaint in Intervention stated a claim upon which relief sought could be granted.

II. From the Judgment, action and Order of the Court on July 30, granting the Motion to Intervene; and the Judgment and Order Permitting Interven-

tion and Ordering and Allowing Filing of the "Complaint in Intervention and Cross-Complaint" of Ted Erdmann;

III. From the Judgment, action and Order of date July 27, which failed to grant the Motion to Dismiss the "Application of Ted Erdmann for Intervention"—Motion having been duly and timely filed and presented herein;

IV. From the actions of the Court in arbitrarily resetting the matter for July 30, to allow Erdmann to attempt to comply with laws and rules of Intervention;

V. From the Judgment, actions and Orders of August 27, 1954, in refusing the Motion of Defendants Kris to Dismiss the "Complaint in Intervention and Cross-Complaint" of Ted Erdmann.

VI. In refusing to enter Order Dismissing the Intervention and then in refusing to enter Order in the form submitted by Counsel for Defense, and in entering the Order in the form submitted by Intervener;

To all of which, exceptions were made and duly allowed.

Notice to be given to Attorneys for Wesley Stoddard and for Little Valley Oil Co., a Utah Corporation—Ward Williams; and for Attorneys for Intervener Ted Erdmann—F. W. Durnan. P. O. Address: Mr. Ward Williams, Attorney, Lynden,

Washington. Mr. F. W. Durnan, (Simonarson, Le-Cocq and Durnan), Attorneys, Lynden, Washington.

LAW OFFICES

GEORGE N. LUSCH,

By /s/ GEORGE N. LUSCH,
Attorneys for Defendants Kris Petroleums, Ltd.,
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

[Endorsed]: Filed August 30, 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents, That we, Kris Petroleum, Limited, and Kris Petroleum, Washington, Inc., as Principal, and Continental Casualty Company, a corporation of the State of Illinois, as surety, are held and firmly bound unto Wesley Stoddard and Little Valley Oil Company, in the sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States, to be paid by them and their successors, to which payment well and truly made we bind ourselves and each of us, jointly and severally, and each of our successors, by these presents.

Sealed with our seals and dated this 30th day of August, 1954.

Whereas, the above-named Kris Petroleum, Limited, and Kris Petroleum, Washington, Inc., have prosecuted an appeal to the United States Ninth Circuit Court from the Western District of Washington, Northern Division, in the above-entitled cause;

Now, Therefore, the condition of this obligation is such that if the above-named Kris Petroleum, Limited, and Kris Petroleum, Washington, Inc., shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

KRIS PETROLEUM, LIMITED, AND KRIS
PETROLEUM, WASHINGTON, INC.,

By /s/ GEORGE N. LUSCH.

[Seal] CONTINENTAL CASUALTY
COMPANY,

By /s/ W. H. HICKS,
Attorney-in-Fact.

[Endorsed]: Filed August 30, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original documents and papers in the file dealing with the above cause as the record on appeal herein from the Order Denying Motion to Dismiss Complaint of Intervenor filed August 27, 1954, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Petition for Removal, with Copy of complaint in Whatcom County Superior Court Cause No. 34109 attached, with summons, filed June 22, 1954.
2. Bond on Removal, filed June 22, 1954.
3. Motion of Kris Petroleum, Ltd., to Dismiss, filed June 26, 1954.
4. Motion of Kris Petroleum (Washington), Inc., to Dismiss, filed June 26, 1954.
5. Motion to make more definite and certain or for a bill of particulars, filed June 26, 1954.

6. Motion to make Little Valley Oil Company an additional party plaintiff, filed June 26, 1954.

7. Plaintiff's Motion for Remand, filed July 7, 1954.

8. Notice of hearing on motions, filed July 7, 1954.

9. Defendants' memorandum on Motion to Dismiss, filed July 13, 1954.

10. Defendants' memorandum on Motion for Remand, filed July 13, 1954.

11. Application of Ted Erdmann to Intervene, filed July 14, 1954.

12. Notice of Application to Intervene, filed July 23, 1954.

13. Motion to Dismiss Application of Ted Erdmann for Intervention, filed July 24, 1954.

14. Amended Complaint, filed July 27, 1954.

15. Memorandum of Authorities by Intervenor, filed July 27, 1954.

16. Defendants' memorandum of authorities on Defendants' Motion to Dismiss petition for Intervention, filed July 27, 1954.

17. Additional memorandum of authorities by Defendants re: Objections to Intervention by Ted Erdmann, filed July 29, 1954.

18. Defendants' Objections to Intervention, filed July 29, 1954.

19. Reply to Motion to Intervene, filed July 30, 1954.

20. Order Permitting Intervention, filed July 30, 1954.

21. Amended Motion to Intervene, filed July 30, 1954.

22. Complaint in Intervention and Cross-Complaint, filed July 30, 1954.

23. Motion to Dismiss Intervention Complaint, filed August 18, 1954.

24. Notice of Motion to Dismiss Intervention Complaint, filed August 18, 1954.

25. Order Denying Motion to Dismiss Complaint of Intervenor, filed August 27, 1954.

26. Order on Motions to Dismiss A/C Lack of Jurisdiction, Failure to State a Claim, etc., filed August 27, 1954.

27. Notice of Appeal to the U. S. Court of Appeals for the Ninth Circuit from Judgment, Actions and Orders of the U. S. District Court, Western District of Washington, Northern Division, filed August 30, 1954.

28. Cost bond on appeal, filed August 30, 1954.

29. Notice and Designation of Contents of Record on Appeal request by Appellant, filed September 15, 1954.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause to wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand

and affixed the official seal of said District Court at Bellingham, this 27th day of September, 1954.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ MARJORIE J. EDQUIST,
Deputy Clerk.

[Endorsed]: No. 14535. United States Court of Appeals for the Ninth Circuit. Kris Petroleum, Ltd., a Corporation, and Kris Petroleum, Inc., a Corporation, Appellants, vs. Wesley Stoddard, Little Valley Oil Co., a Corporation, and Ted Erdmann, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 1, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals, for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 14535

KRIS PETROLEUM, LTD., a Foreign Corpora-
tion, and KRIS PETROLEUM, INC., a Cor-
poration,

Appellants,

vs.

TED ERDMANN,

Appellee,

WESLEY STODDARD and LITTLE VALLEY
OIL COMPANY, a Corporation,

Plaintiffs.

APPELLANT'S STATEMENT OF POINTS
TO BE RELIED UPON

1. The Application to Intervene, filed July 14, 1954, was defective in that it was not accompanied by any pleading as required by Rule 24(c).

2. The intervener's action is barred by the Statute of Limitations.

(a) The Motion to Intervene, filed July 30, 1954, which motion was by order of the Court marked "amended" over the objection of the appellants, constituted the "commencement" of an action to foreclose a purported lien upon the face of which it appears to be barred by the Statute of Limitations of time within which a lien foreclosure may be com-

menced, as provided by R.C.W. 60.04.100, limiting the commencement of action for foreclosure of a lien to a period not more than eight (8) months after its filing, which eight (8) months period in this case expired on the 17th day of July, 1954, said date being the last day of the said eight (8) months period within which foreclosure proceedings could be commenced.

(b) It is the contention of the appellants that since the original Application to Intervene was fatally defective in not complying with Rule 24 (c), it could not be amended and consequently it was an original proceeding notwithstanding the purported arbitrary direction of the District Court that it be marked "amended."

(c) That the District Court obtained no jurisdiction of the res and is without jurisdiction to determine the controversy between appellants and intervenor.

3. That the Complaint in Intervention alleges a lien upon different property from that sought to be foreclosed in the principal action. Even though the Complaint in Intervention be considered as timely filed, which appellants deny, then it presents no common question of law or fact, required by Rule 24(b).

4. The amount in controversy alleged in the Complaint in Intervention, to wit: One Thousand Six Hundred Three Dollars and Fours Cents (\$1,-

603.04), fails to meet the jurisdictional amount required for a United States District Court.

5. No proper allegations of citizenship by intervenor.

6. That the only property in the custody of or under the jurisdiction of this Court is the property described in the lien involved in the Plaintiff's action and not that described in the Complaint in Intervention, and hence the intervenor does not claim any interest in property within the custody of or subject to the jurisdiction of the Court in the principal action.

7. Error in Denying Motions of Defendants.

LAW OFFICES

GEORGE N. LUSCH,

By /s/ GEORGE N. LUSCH,

Attorneys for Defendants, Kris Petroleums, Ltd.,
and Kris Petroleums (Washington), Inc.

Of Counsel:

/s/ GRAHAM K. BETTS.

Notice has been sent to Ward Williams, Attorney for Wesley Stoddard and Little Valley Oil Co., Lynden, Washington; and to F. W. Durnan of Simonarson, LeCocq and Durnan, Attorneys for Ted Erdmann, Lynden, Washington. •

GEORGE N. LUSCH.

[Endorsed]. Filed November 8, 1954.

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GEORGE N. LUSCH.

[Endorsed]. Filed November 8, 1954.

No. 14535

In the United States Court of Appeals
for the Ninth Circuit

KRIS PETROLEUM, LTD., a Corporation, and
KRIS PETROLEUMS (Washington), Inc., A Corporation
Appellants

vs.

WESLEY STODDARD, LITTLE VALLEY OIL Co.,
A Corporation
and

TED ERDMANN (Intervenor)
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Chief Judge*

BRIEF OF APPELLANTS

GRAHAM K. BETTS,
GEORGE N. LUSCH,
Attorneys for Appellants.

Beyers Building
Seattle 6, Washington

FILED

FEB 25 1955

PAUL P. O'BRIEN,
CLERK

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Chief Judge*

BRIEF OF APPELLANTS

JURISDICTION

This is an appeal from an order of the U. S. District Court for the Western District of Washington, Northern Division, permitting Intervention (R-42). It is contended that the District Court was without jurisdiction to make the Order Permitting Intervention.

Jurisdiction of this court is found in 28 USCA 1291 and in Federal Court Rules 73 and 75 and Appellants' Notice of Appeal (R-55), Bond on Appeal

(R-58), and Statement of points to be relied upon (R-64), all filed in compliance with said rules.

The main action in which the Appellee (Erdmann) seeks to intervene is an action brought by the Plaintiff Stoddard, the additional Plaintiff, Little Valley Oil Company having been later impleaded, to foreclose two liens for labor and material allegedly furnished to the Defendants (Appellants) by the Plaintiff. The action commenced in the State Court was removed to the District Court on diversity of citizenship.

The allegations of the original Application by Appellee Erdmann, to Intervene (R-18, 19) claims a lien allegedly on the same property involved in the main action, which, if true, could create a common question of law or fact vesting the District Court with jurisdiction sufficient to pass upon the Application to Intervene (Rule 24 (b) (2)). These allegations are likewise contained in the Complaint in Intervention (R 37-42), but where, as here, it appears on the face of the record that the same property is not involved in the two actions (compare liens of Plaintiff R-13 and R-15 with lien of Intervenor (R-41) and where—as here—other jurisdictional requirements are absent (amount involved is \$1,603.04, R-40), and diversity of citizenship is not shown, the District Court is without jurisdiction to entertain the Intervention and the Application must be denied.

Since the District Court was without jurisdiction and departed from the prescribed rules, the Appellants have appealed. The Intervention should be denied.

STATEMENT OF PLEADINGS

The main action originally commenced in the Superior Court of the State of Washington by the sole Plaintiff Wesley Stoddard and was removed to the U. S. District Court on Diversity of Citizenship, where on Motion of Defendants, the Little Valley Oil Company was joined therein as party Plaintiff.

The Amended Complaint of Plaintiffs Stoddard and Little Valley Oil Company states two causes of action upon labor and material liens, seeking foreclosure thereof, and a third cause of action upon an open account and praying judgment therefor (R 3-10). The two liens attached to the Plaintiff's Amended Complaint and marked Exhibit "C" (R-13) and Exhibit "E" (R-15) describe the property covered as

"The N. E. 1/4 of the S. E. 1/4 of Section thirty-one (31) Township 41, Range 3 E of W.M." (R-13).

and

"Township forty (40), Range (3) three E. of W.M.; Township forty (40), Range two (2) E. of W.M.; Township forty-one (41), Range two (2) E. of W.M." (R-15).

The Intervenor, Ted Erdmann, Appellee herein,

filed his original Application to Intervene on July 14, 1954, (R-18) noting the same for hearing July 27, 1954 (R-17). This Notice and Application were not accompanied by any pleading as required by Rule 24 (c). In response to this Notice and Application the Defendants did file their written Motion to Dismiss (Objections) (R20-25) all of which was argued to the Court on July 27, 1954.

After argument, it appearing that the Application to Intervene was defective, the Court of its own motion continued the matter to July 30, 1954; shortening time for service and directing proper procedure by the Intervenor. (Minute entry R-25).

At the time of hearing on July 30, the Intervenor filed his "Motion to Intervene" (R-31) which was by the Court, over Defendants' objection directed to be marked "Amended" (R-31) accompanied by his Complaint seeking to foreclose a labor lien for \$1,603.04 (R 37-41), to which Complaint is attached as Exhibit "A" his lien for labor covering property described as the.

"N.W. 1/4 of the S.W. 1/4 of Section thirty-two (32) Township forty-one (41) North of Range three (3) E.W.M." (R-41).

which is not the same property against which foreclosure is sought in the main action.

To all of this the Defendants filed their written Re-

ply (Objections) (R 33-41), upon grounds previously stated at the hearing on July 27 (R 20-25), and upon the jurisdictional grounds that the amount involved is less than \$3,000.00, to-wit \$1,603.04, and that there is no Diversity of Citizenship between the Intervenor and the Defendants, Appellants.

After the order allowing Intervention (R-42), the Defendants, Appellants, filed their Motion to Dismiss the Complaint in Intervention (R 45-51), upon the grounds previously urged as Objections to the Application for Intervention, and upon the further ground that the Intervenor's action to foreclose his alleged lien was not commenced within the time limited or prescribed therefore by Washington Statutes (R.C.W. 60.04.100). This Motion was likewise denied (R-52).

STATEMENT OF CASE

The questions involved in this Appeal relate to lack of jurisdiction of the District Court in the following particulars:

First: The jurisdictional amount of \$3,000.00 not involved—(\$1,603.04);

Second: Diversity of Citizenship is not shown;

Third: Procedural matters not permitted by, and contrary to District Court Rules as follows:

a. The original Application to Intervene, ab-

sent a Complaint, failed to comply with Rule 24 (c).

b. The allowance of time, or continuance granted on the Court's Motion, to enable the Intervenor to properly come before the Court is without support in any rule and could not toll the statute limiting the time within which a foreclosure could be commenced.

c. The failure to file a Complaint with the original Application to Intervene resulted in the commencement of no action as provided by Rule 3, hence the filing of the Complaint in Intervention on July 30 could not relate back to the date of filing the original Application (July 14, 1954) to give the District Court jurisdiction even if other jurisdictional requirements could be met.

d. The July 30 filing did not comply with the Statutory Limitation of eight (8) months within which to commence a lien foreclosure, and there has never been the "commencement" of any action by the Intervenor as required by state law governing lien foreclosure.

The alleged errors were all properly preserved for Appeal by timely Objections, Motions to Dismiss and Exceptions to the Court's Rulings as hereinbefore set out.

SPECIFICATIONS OF ERRORS RELIED UPON

1. The District Court erred in assuming jurisdiction

of the Complaint in Intervention because of:

- a. Lack of Jurisdictional Amount;
- b. Lack of Diversity of Citizenship;
- c. No Common Question of Law or Fact;
- d. Not the same property involved in main action;
- e. Lien foreclosure period had expired when complaint was filed.

2. The District Court erred in entertaining jurisdiction to hear and determine the Application for Intervention because:

- a. The Application was not accompanied by any Complaint as provided by Rule 24 (c);
- b. The Application shows no right of intervention as provided by Rule 24 (a);
- c. The Application shows no ground for permissive intervention as provided by Rule 24 (b).

3. The District Court erred in granting the continuance after argument of July 27, because:

- a. The Application to Intervene being then unaccompanied by a Complaint presented nothing for the Court to determine or continue.
- b. The subsequent filing of a Complaint could not relate back to the date of filing the original application since the subsequent Complaint

was an original proceeding unrelated to any prior pleading, thus no action was commenced within the time limited by law.

4. The District Court erred in permitting Intervention because it appeared on the face of the record—timely called to the attention of the Court—that the District Court was without jurisdiction in the several particulars enumerated.

SUMMARY OF ARGUMENT

It is the contention of the Appellants that a complaint in intervention is an original action and as such must affirmatively show all jurisdictional requirements requisite to an original action in a United States Court. The lack of such a showing vests no jurisdiction and the court cannot further entertain the matter.

The order is an appealable order for lack of jurisdiction of the District Court to make it, by reason of insufficiency of the complaint to allege jurisdictional facts and because it affirmatively appears that the cause of action alleged no longer existed when the Complaint in Intervention was filed July 30, 1954.

AN APPEALABLE ORDER

The District Court was without jurisdiction to make the order appealed from and for that reason alone it is an Appealable Order and reviewable.

The Order of July 30, 1954, Permitting Intervention (R-42) is an Order Finally Determining the Existence of a Lien and is a Final Appealable Order which determines the very existence of the alleged cause of action in favor of the Intervenor.

The lien had expired at the time of the Order Permitting Intervention July 30, 1954 (R-42) and at the time of filing of the Complaint in Intervention July 30, 1954 (R 37-42).

The District Court was without jurisdiction to make the order appealed from, regardless of the finality of the order, and for that reason alone it is reviewable.

As to the right of appeal from an Interlocutory Order, the Supreme Court said in *Phillips v. Negley*, 117 U.S. 655:

“If on the other hand, the order made was made without jurisdiction of the Court making it, then it is a proceeding which must be the subject of review by an appellate court.” page 672. (emphasis ours)

In *U.S. Ex rel Tungsten R. Mines Co. v. Ickes*, 84 Fed.(2d) 257 (App D.C.), the Plaintiff-Relator—appealed from an interlocutory order. The Defendant-Respondent—Secretary of Interior—sought dismissal of the appeal “*because the order appealed from is interlocutory*”

The Court said:

“As to this, we have said many times that an appeal of right does not lie from an interlocutory order . . . But the rule is subject to this exception: If the decree appealed from was made without jurisdiction on the part of the Court making it, then *it is a proceeding which may be*—or as the Supreme Court said *must be*—*the subject of review by an Appellate Court.* . . . In this view *the question is not whether the Order is final or interlocutory, but whether the Court exceeded its power in entering it.*” Page 259. (Emphasis ours)

Where an impleaded party was not indispensable to the suit and when the joinder would oust the federal court of jurisdiction because of lack of diversity of citizenship, this court has held it an abuse of discretion to require such party to be joined and therefore appealable.

Rose v. Saunders, 69 Fed(2nd) 339 (CCA9)

NO PLEADING

Motion to Intervene must be accompanied by a Pleading (Rule 24-c). An action is commenced, and only commenced “When a Complaint is filed,” (Rule 3). “A civil action is commenced by filing a complaint with the Court.”

“An Intervention is for all intents and purposes an original party.” *In re Raabe, Glissman & Co., Inc.*, 71 Fed Supp 678, 690 (D.C. N.Y.)

In *Miami County National Bank of Paola, Kansas v. Bancroft*, 121 F(2nd) 921 (CCA. 10) 925, 926, the Court said:

“The Motion for Intervention must state the grounds therefor and shall be accompanied by a pleading setting forth the claims or defense upon which intervention is sought. . . . The purpose of the rule . . . is to enable the Court to determine whether the applicant has the right to intervene, and, if not, whether permissive intervention should be granted.”

The purpose of the rule, 24 (c), is not only to inform the Court of the grounds upon which intervention is sought, but also to inform parties against whom some right is asserted or relief sought, *so they may be heard before the Court passes on the Application.*

International Brotherhood Teamsters v. Keystone Freight Lines, 123 Fed. Supp.(2nd), 326 (C.C.A. 10)

Court and litigants must follow federal rules of civil procedure in the same manner as they must obey a statute.

Beasley v. U.S., 81 Fed Supp 518 (D.C. S.C.)

In *Mullins v. DeSoto Securities Co.*, 2FRD 502 (D.C. La.) where applicants adopted Plaintiff's allegations, the Court held such adoption insufficient, saying:

“There is no distinct pleading setting forth the

claims for which intervention is sought. This is another good and separate reason to deny intervention." P. 507.

Since an intervenor in an action or proceeding is for all intents and purposes, an original party — *In re Raabe, Glissman & Company, Inc.*, 71 Fed Supp 678, 680, the necessity for compliance with Rule 24 (c) is at once apparent because, absent a Complaint, the Court is without any means of determining whether an applicant for intervention has a right thereto, as provided by Rule 24 (a), or whether there is a permissible intervention by reason of Rule 24 (b), in regard to which the Court can exercise any discretion.

It necessarily follows that on July 27 there was nothing for the court to pass upon, nothing which the court could continue, and nothing which could be amended either with or without the direction of the court. Hence, there was nothing upon which the court's order of that date (Minute entry R-25, 26) could operate.

NO JURISDICTIONAL AMOUNT

There is insufficient jurisdictional amount involved. The Intervenor sues for \$1,603.04. (Complaint in Intervention R-38, 39, 40).

It is essential to the court's jurisdiction that it appear from the face of the Intervention Complaint that the amount of more than \$3,000.00 is involved, a

lien foreclosure not being within any of the statutory actions granted jurisdiction irrespective of the amount in controversy.

“The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount”; *Pinel v. Pinel*, 240 U.S. 594, 596.

The allegation of paragraph 3 of the Complaint in Intervention is that the defendants are indebted to the plaintiff in the sum of \$1,603.04 which is far short of the jurisdictional requirement.

The Intervenor cannot avail himself of the amount of the Plaintiffs' claim to sustain jurisdiction of the court as to his own separate individual claim.

In *Hackner v. Guaranty Trust Co.* of New York, 117 Fed (2nd) 95 (C.C.A. 2) several parties having separate claims joined in one action to attain the jurisdictional amount, none of whom individually could justify jurisdiction. Subsequently, an attempt was made to join additional parties who, it was alleged, could individually justify the jurisdictional amount, one of whom (York) had not been injured but if she had been, she would have been injured only in the amount of \$3,000.00 and one of whom (Eastman) had been injured in a sum greater than \$3,000.00. The Court said:

“As to York, there cannot exist jurisdiction any

more than as to the original plaintiffs, and it cannot be supplied for her or for them by adding a plaintiff who can show jurisdiction." P. 98.

In *Reppel v. Board of Liquidation et al*, 11 Fed Supp 799 (D.C. La.) a Statutory 3-Judge Court, speaking of a motion to dismiss a bill in intervention said:

"As to the amount involved, the trustees of the Hersheim fund, having been permitted to intervene, must be considered the same as an original plaintiff." P. 802

and since

"The amount in controversy between one of the plaintiffs, and . . . the appellees, is admitted to be only . . . about \$1,000.00 and the court below, properly dismissed the bill as to her, for want of jurisdiction." *Weems et al v. Carter et al*, 30 Fed(2nd) 202, 204 (CCA 4)

It being the case law that, first, an intervenor comes into an action as an original party; and second, that separate claims cannot be joined to attain the jurisdictional amount, the courts jurisdiction of the complaint in intervention did not attach upon the filing thereof, it appearing on its face that the amount involved is less than \$3,000.00, the District Court was without jurisdiction.

NO DIVERSITY OF CITIZENSHIP

Nowhere in the Intervention Complaint (R 37-42)

or in the Application to Intervene (R 18-19) or in the Motion to Intervene (R 31) is the Citizenship of either the Intervenor or defendants, appellants, alleged, as required.

The Supreme Court in *Mansfield, Coldwater & Lake Michigan Railway Company and Another v. Swan and Another*, 111 U.S. 379 said, page 382:

“And according to the uniform decisions of this court, the jurisdiction of the Circuit Court fails, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record.”

Search as we might the record in this intervention, we cannot find such affirmative showing anywhere in the record, and further, we could not find such a showing by any implication.

For the dual want of jurisdictional amount and diversity of citizenship, the court not only abused its discretion but also exceeded its jurisdiction in granting this Motion to Intervene.

NO EXISTING LIEN

As heretofore pointed out the lien claim of the Intervenor (R 41) describes property different from that described in his Complaint in Intervention. Intervenor's lien is fatally defective as to jurisdiction. He seems to have adopted the plaintiffs' description by the allegations of Paragraph I of his Answer to

Plaintiffs' complaint (R 37) and by Paragraph II of his cross-complaint (R 37-38). This is an acknowledgment that his description contained in the lien is incorrect, in which event his lien is fatally defective. We quote from *The Mount Tacoma Manufacturing Company v. August Cultum et al*, 5 Wash. 294, a lien foreclosure action:

“The only logical theory upon which this action can be sustained is the theory that there is no virtue whatever in the description of a lien notice, for there is nothing in this notice to lead one to the premises sought to be foreclosed, but everything to lead them in another direction. It is not a case of insufficiency of description, but the statement in the lien notice flatly contradicts the statement of the complaint. No reconciliation is possible.” P. 295.

Even if the Intervenor's lien had properly described the property, then, nevertheless there can be no lien foreclosure in behalf of Intervenor since it appears of record that the Intervenor's lien was extinguished by lapse of time prior to the filing of Intervenor's Complaint in Intervention.

The Washington Law RCW 60.04.100 provides:

“*No lien created by this Chapter binds the property subject to the lien for a longer period than (8) calendar months after the claim was filed, unless an action is commenced within that time to enforce it.*”

The record discloses that the Intervenor's Lien Claim was filed on November 17, 1953, (R 38) and Complaint in Intervention was not filed until July 30, 1954 (R 42) being more than eight months.

In *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530, the Supreme Court—in ruling on the applicability of Rule 3, as against the State of Kansas statute relative to the Commencement of an Action, held the State Statute governed because:

“Since the cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in federal court as in the state court. . . . It accrues and comes to an end when local law so declares. . . . Where local law qualifies or abridges it, the federal court must follow suit.” P. 533.

Local law requires the commencement of a lien foreclosure action to be by service upon the necessary parties to its maintenance within eight calendar months of its filing, R.C.W. 60.04.100.

“It follows that personal service must be made upon, or service by publication must be commenced against, such necessary parties within eight months after the lien is filed, else the court acquires no jurisdiction to enforce the lien.” *City Sash and Door Company v. Bunn*, 90 Wash. 669, 675.

No such personal service was had and this defect was properly brought before the District Court by the appellants objections filed July 24 (R 20-25) argued July 27 (R 25), (minute entry) by their objections filed July 29 (R 28-30) argued July 30 (R 42), (Order Permitting Intervention) and by their Motion to Dismiss filed August 18 (R 45-51), argued August 27 (R 52), (Order denying Motion to Dismiss).

Considering this case law it is immediately clear that the District Court has wrongfully assumed jurisdiction of an action, if otherwise properly brought, which by law had become non-existent.

Since there has been no service upon any defendant as required by local law, Rule 3 must give way, and even if jurisdictional facts could be pleaded, and the theory of relation back could be indulged in, there still would be nothing before the court for its determination.

CONCLUSION

It is respectfully urged that since the Appellee failed to comply with the rules by filing a Complaint in Intervention with his Application to Intervene, the District Court at that time obtained no jurisdiction, that his belated filing failing to state jurisdictional facts vested no jurisdiction; that the belated filing was not the "commencement" of lien foreclosure as declared by the statute creating it, and the lien having ceased to exist, the court in making the order permitting intervention had no jurisdiction to make it.

For these reasons the Order appealed from should be dismissed.

Respectfully submitted,

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No. 14536

IN THE
United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs

UNITED STATES OF AMERICA,....

Appellee.

BRIEF OF APPELLANT UPON APPEAL FROM
DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF ARIZONA.

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PAUL P. O'BRIEN, CL

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,....

Appellee.

BRIEF OF APPELLANT UPON APPEAL FROM
DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF ARIZONA.

STATEMENT OF THE CASE

The Indictment in this case contained eight counts. Counts III and VI were dismissed and a verdict of guilty was returned on each of the other Counts:

Count I, of the indictment reads as follows:

“Count I. (26 U.S.C. 2554 (a))—That on or about the 24th day of September, 1953, within the County of Maricopa, State and District of Arizona, Bernard Bloch did then and there, knowingly, wilfully,

Where not otherwise designated numbers refer to the page in the Abstract of record.

fraudulently and feloniously sell to one R. S. Cantu, a certain quantity of narcotic drug, to-wit, approximately 10 c.c. of morphine sulfate, which said sale was not in pursuance of a written order of the said R. S. Cantu to the said Bernard Bloch on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by Act of Congress of December 17, 1914, and which said sale was not in the course of professional practice as a physician and R. S. Cantu not being a patient of the said Bernard Bloch, and which said sale was not pursuant to a prescription."

Counts II, IV, V, VII and VIII charge violations of the same section by alleged sales to the same R. S. Cantu all in 1953. For ready reference we list the following information with reference to each of the counts: Count No., Date of Alleged Sale; the description of the Narcotic and the Exhibit No.

Count No. I

Date of Sale: September 24,

Description of Narcotic: 10 c.c. morphine sulfate

Exhibit No. 4A

Count No. II

Date of Sale: October 29

Description of Narcotic: 10 c.c. morphine solution

Exhibit No. 5A

Count No. IV

Date of Sale: October 30

Description of Narcotic: 10 c.c. morphine and 1/20 gr. dilaudid

Exhibit No. 6A, 6B

Count No. V

Date of Sale: November 10

Description of Narcotic: 30 c.c. morphine hydrochloride

Exhibit No. 7A

Count No. VII

Date of Sale: November 16

Description of Narcotic: 10 c.c. morphine solution

Exhibit No. 8A

Count No. VIII

Date of Sale: November 19

Description of Narcotic: 20 c.c. morphine

Exhibit No. 9A (3-6)

JURISDICTION

The jurisdiction of this Court is invoked under the provision, Section 1291 of Title 28 U.S.C. The Trial Court had jurisdiction by virtue of Title 26, U.S.C. 2554 (a).

STATEMENT

The defendant was at all times involved in this case a duly licensed Osteopath and at the time of the trial he had practiced eight years at Sunnyslope, Arizona. (176) His record shows that after his graduation from the Osteopathic Medical School in Chicago (177) he had considerable hospital training and experience. (177-178-179) At the time of the charge in the Indictment he was duly registered as required by law and the holder of a Government Narcotic License. (289) (215)

On April 21, 1954, prior to the trial, appellant filed a motion supported by affidavits for the return of seized property and suppression of evidence. (12-13-14) This motion was directed to the search of November 19.

The ruling on this motion was reserved until the time of the trial. (15) A trial was had before the jury and on May 27, 1954, a verdict was returned finding the defendant guilty as charged in Count I, II, IV, V, VII and VIII. (23)

A timely motion for acquittal and for a new trial was filed June 2, 1954. (24-25) This motion was denied on July 6, 1954 and the appellant was sentenced to prison for a term of two years. (25)

A notice of the Appeal together with the required bond was timely filed on July 6, 1954 (28)

It will be necessary in our argument on each of the specifications of error to refer to and quote the evidence to some extent. We will therefor for the sake of brevity postpone a detailed statement at this time.

SPECIFICATION OF ERRORS

Specification of Error No. I

The Court erred in denying appellant's motion for a return of seized property and a suppression of evidence. (12-13-14) (19)

Specification of Error No. II

The Court erred in denying the motion for acquittal made at the conclusion of plaintiff's case. (20)

Specification of Error No. III

The Court erred in denying appellant's motion for acquittal and for a new trial made June 2, 1954. (23-25)

Specification of Error No. IV

Prejudicial error was committed by the misconduct on the part of the Assistant U. S. Attorney in asking the defendant if he had ever been convicted of a felony. (222)

Specification of Error No. V

The Court erred in admitting testimony based upon the search of Appellant's premises on November 19. (116-125-152-156-162-163 and 168)

Specification of Error No. VI

The Court erred in submitting the question of entrapment to the jury. (291)

ARGUMENT

Specifications I and V may be argued together as they are based generally upon the same grounds, namely: illegal search made by the Officers of appellant's premises on the 19th day of November. It was established that a warrant of arrest had been issued three days before but it is clearly established by the evidence and it is uncontradicted that the officers did not have a warrant of arrest with them and that no search warrant had ever been issued. Witness Cantu testified that he had no search warrant. (147-148) Witness Gail Welsh also testified that they had no warrant for appellant's arrest and that they had no search warrant. (154) Witness Ross testified that there had been a warrant for appellant's arrest three days before by the U. S. Commissioner. (161)

The fact that a warrant had been issued three days before the search emphasizes the fact that the Government had ample time in which to have a search warrant issued. They had been watching the appellant for three years. (164-165)

One of the Federal Officers, Mr. Cantu, had been in contact with the appellant and had been in his office on five occasions between September 24 and November 19.

Go-Bart Importing Co. v. U.S.

282 U.S. 344

U.S. v. Lefqowitz

285 U.S. 452

Gould v. U.S.

255 U.S. 298

U.S. v. Robinowitz
 70 S.Ct. 430, 339 U.S. 56
 Judd v. U.S.
 190 Fed (2nd) 649
 Nelson v. U.S.
 208 Fed. 2nd, 505

While in the Robinowitz case *supra* the court modified the ruling formerly announced regarding the necessity of a search warrant where there was sufficient time to secure one. The ruling that the search must be reasonable still obtains however. In determining the reasonableness of a search many factors must be taken into consideration. We think the time element as it existed in the present case is one of those factors.

Another element to be taken into consideration in this case is that the search was a general exploratory search. (155-156) We quote from Officer Welsh's testimony:

"Q. Did you go into any of the other rooms?

A. Yes.

Q. Assisting in the search?

A. Yes.

Q. Where did you go after you searched Doctor Bloch?

A. Well, I went with Dr. Bloch wherever he went."
 (155)

Again quoting from Officer Welsh's testimony:

"Q. How many rooms would you say you went through in this search?

A. Three or four there in the front part of the building." (156)

Mr. Justice Minton in his opinion referred to the Go-Bart case and the Lefqowitz case and said:

“Those cases condemn general exploratory search which cannot be undertaken by officers with or without a warrant.”

In the Lefqowitz case the court quoted from the Gould case. We think the following is particularly appropriate in the present case:

“Respondents papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not be lawfully searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and describing exactly where they were.”

We also quote the following from the Lefqowitz case: “Security against unlawful searches is more likely to be obtained by resort to search warrants than by the reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.”

A more convincing example of the truth of the foregoing statement could not be found than the search in the present case. Here a search was made of a Doctor's office and private papers and records of the Doctor's patients were seized. There is no more confidential relation than that between a Doctor and patient and if the officers had prior to the search made application to any Magistrate for a search warrant indicating that they desired to seize such papers I am sure it would have been denied. None of the articles seized with the exception of the money was used or could have been used in connection with the crime that the defendant was charged with and as said in the Lefqowitz case the sole purpose of the officers in seizing the papers and records was not to find articles used in the commission of the crime charged but was for the purpose of finding evidence of other crimes. The search could not have been for the purpose of finding narcotics

for the officers well knew that the defendant being a physician could legally possess narcotics.

While it is true that none of the articles seized in this search with the exception of the money was used in evidence, error was committed in permitting the witnesses to testify as to the result of the search. If it is wrong to permit testimony as to what they saw or found in making the search, it is equally wrong to permit a witness to testify as to what he did not see or did not find. In the present case the witnesses were permitted to testify that they did not find a patient card for the witness Cantu (163) who was known to the appellant as Raymond Portillo. We quote part of the testimony of one of the witnesses, Philip P. Ross.

“Q. And in your examination, did you find a patient card, or a dispensing record for Renaldo S. Cantu.

A. No, I did not.

Q. And did you search for it particularly?

A. I searched for Raymond Portillo in particular, but I found none.

Q. There was no record for a Raymond Portillo either?

A. No.” (163)

This evidence had only one purpose and that was to create in the minds of the jury the impression that the treatment of Cantu by the appellant was secret and criminal. This testimony was very prejudicial and much emphasis was placed upon it by the Government.

It cannot be claimed that the appellant consented to this search. The appellant was confronted by five officers and the testimony of Witness Ross states that he was very nervous. (162) (217)

In considering a similar situation in the Judd case *supra*, the court said:

“Intimidation and duress are almost necessarily implicit in such situations.”

Specification of Error No. VI

“The Court erred in submitting the question of entrapment to the jury.”

This specification is based upon the proposition and theory that in view of the fact that the evidence clearly establishes all of the elements of entrapment, the court should have as a matter of law found that the appellant was illegally entrapped.

The Court instructed the jury in part as follows:
 “Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.” (291)

Now let us examine Agent Ross' testimony to the effect that the appellant had been under investigation for a period of two to three years (164) and no complaint except the one in the instant case had ever been made. (166) Cantu testified to the same effect:

“Q. So Doctor Bloch had been under investigation for two solid years by your office.

A. Evidently, yes, sir.

Q. And during those two years, nothing had been found out of the way with reference to his dispensing of narcotics?

A. Correct.” (122-123)

When you consider the appellants long years of practice, 8 years of them at the same place in Arizona, it would seem that this case has all of the elements of

illegal entrapment. Appellant had been treating one Hernandez and family for sometime (182) with the knowledge and the consent of the Narcotic Enforcement Officers. (181-183) Appellant was treating Hernandez with a medication consisting of a narcotic in a small amount and atropine, which is an antidote. (184) It is undisputed that the officers asked Hernandez to introduce Cantu to the Appellant for the purpose of making a case against the appellant.

We quote from the appellant's testimony regarding this introduction:

"But he told me it was his brother, and that he had just come in from Los Angeles, and he was very sick, and he had abdominal cramps. And I told him I wouldn't take care of him, and I didn't take care of his brother, Cantu, Raymond, that day. (183)

This was a direct appeal to the sympathy of the appellant by a patient.

The above testimony of appellant was never contradicted by Hernandez. He was subpoenaed by the Government but was never put on the stand, which in view of the circumstances in this case has some significance. He was not called to corroborate Cantu's testimony as to their first meeting with appellant. Haven't we the right to conclude that Hernandez had he been called would not have corroborated Cantu's statement but would have corroborated the appellant. It seems very clear from all of the testimony that had it not been for the relationship between the appellant and Hernandez; had it not been for Hernandez's request, the appellant would not have attempted the treatment of Cantu or furnished him with narcotics. Up to the time of the meeting between the appellant and Cantu there is not a single bit of evidence which would indicate any violation of the narcotic law on the part of the

appellant, or any disposition to do so. What evidence there is in that connection is to the contrary. We must therefore conclude that the actions of the appellant were the result of suggestion and invitation by the government agents.

Let us briefly review the plot of the agents to entrap the appellant. He had been permitted for a long period of time to treat Hernandez and when the Agents after three years of careful surveillance were unable to discover any criminal activities on the part of appellant, they finally resorted to the use of Hernandez.

The quotation we have taken from the Court's instructions on the law of entrapment correctly states the law and it is supported by all of the authorities which counsel has been able to find. We therefore respectfully submit that because of that law and under the facts in this case as a matter of policy, the conviction is forbidden.

Specification No. II and No. III

No. II—"The Court erred in denying the motion for acquittal made at the conclusion of plaintiff's case."

No. III—"The Court erred in denying appellant's motion for acquittal and for a new trial made June 2, 1954."

At the outset the court should determine that Exhibit 3 and Exhibit 4A were improperly submitted in evidence, there not being sufficient testimony to connect them with the appellant.

The evidence in regard to Exhibit 3 was given by Cantu. He was a block away when he saw Hernandez come out of Appellant's office. He received the Exhibit from Hernandez but he did not see Hernandez receive the Exhibit from the Appellant. (96-97)

We submit that Exhibit 4A may be disposed of on the same basis and Exhibit 4A, is the exhibit upon which Count I depends.

Cantu's testimony in connection with this Exhibit is in substance as follows:

The witness gave appellant a \$20.00 bill. Hernandez and the appellant left the room and a few minutes later when Hernandez returned he and the witness Cantu were walking down the hallway when Hernandez handed it to Cantu. (99-100)

The Government in its studied effort to keep Hernandez from the witness stand relied upon the rankiest kind of hearsay and incompetent evidence in laying the foundation for the admission of evidence of Exhibit 3 and Exhibit 4A. The cumulative effect of such evidence together with the other errors complained of by appellant could not fail to influence the jury to the prejudice of appellant.

Let us now consider the insufficiency of the evidence as to the remaining counts. The appellant was charged with the sale of narcotics not in pursuance of a written order, not in the course of professional practice as a physician and not in pursuance of a prescription to a patient. We think it will be conceded that if the sale was made in the course of professional practice as a physician that no order blank was necessary and it could be administered directly without a prescription.

We are convinced that the jury did not understand. The lack of a written order and the lack of a prescription were emphasized. It is true the exception was also mentioned by the court in its instruction but we do not believe that the exception was made sufficiently clear so that the jury understood.

The witness Cantu was asked practically the same question as to each Exhibit, namely: Did he have an Order Blank? (104-108-114) He was also asked if he secured the drugs without a prescription. The court in its instructions on the lack instructed in part as follows:

“Now it says in the beginning, ‘It shall be unlawful for any person to deliver, sell, barter, or give away any narcotic drugs except in pursuance of these written orders.’” (288)

“Now, I have stated the law under which the indictment is found declares it shall be unlawful for any person to sell, barter, exchange, or give away any opium or coca leaves, or any compound, salt, derivative or preparation thereof, except in pursuance of the written order which I have explained to you.” (288)

While it is true in its instructions in a general way the court mentioned the exception but no where did the court directly tell the jury that the appellant came under this exception, if he administered the narcotic in the course of his professional practice. On the contrary the necessity for order blanks was emphasized again when the court said:

“It is also undisputed that if the sale or dispensing of morphine and dilaudid, as charged in the various counts in the indictment were made, they were not made upon forms issued in blank for that purpose by the Treasury Department.” (289-290)

Let us now consider the small amount of narcotics involved as well as the fact that each time morphine was furnished it was in a solution with atropine and sometimes vitamins and benedril were added. (186)

Each of the Exhibits of Narcotics contained a very small amount of morphine. One of the exhibits contained one-eighth of a grain per c.c. Exhibit 7A contained one-sixteenth of a grain per c.c. and the largest

amount was one-fourth of a grain per c.c. (256) If we take the Exhibits as listed in the first part of this brief, for example, Count V, Exhibit 7A which was 30 c.c. morphine hydrochloride, which was the largest in volume of any of the Exhibits. Considering one-sixteenth of a grain of morphine per c.c. the exhibit contained less than two grains of morphine. The total amount of morphine sulphate or morphine solution in all the counts of all of the indictment amount to ninety cubic centimeters. We believe that the court should take judicial notice of the fact that the total amount of morphine in all these exhibits would satisfy the cravings of an addict for a few days only yet the elapsed time was over two months. Let us take Exhibit 4A of Count I which contained one-twelfth of a grain per c.c., the total amount would be less than one grain (185) and according to the evidence it was not until October 29, almost a month later that another 10 cubic centimeters of morphine was furnished. It is difficult for us to understand how any one could believe that under the circumstances appellant was furnishing morphine to an addict to satisfy his cravings. On the contrary isn't it more reasonable to consider it a treatment?

Dr. Charles Crudden, a Government witness testified that adding atropine to a morphine sulphate solution would alleviate some of the symptoms, if the morphine is given in relatively mild dosage. (284) We also quote the following from his testimony:

“Q. And, as you stated, the combination of the morphine sulphate and atropine is a method of treating an addict?

A. Yes. (285)

Dr. Meyers a defense witness and who had not seen appellant until the day he testified. (252) Dr. Meyers testified as follows with reference to the use of atropine:

“Q. Is it used in the treatment of narcotic addicts?

A. Yes; it is used by physicians. It is not a drug which is commonly used, but certainly if I were to give a drug to an addict and didn't want him to take too much of it, I would put something like atropine in it.” (258)

Again in answer to a question which outlines in general the treatment by the appellant: Dr. Meyers answered:

“I would say that such a preparation would definitely be given for treatment, rather than a treat, as you put it.” (261)

Critizing the appellant's methods of administering narcotics and charging him with a criminal offense are entirely different propositions. It is not a felony to make an honest mistake or an error in judgment nor is it a crime to use one method of treatment in preference to another.

Specification of Error No. IV

No. IV—“Prejudicial error was committed by the misconduct on the part of the Assistant U. S. Attorney in asking the defendant if he had ever been convicted of a felony.”

This assignment charges that prejudicial error was committed by the Assistant U. S. Attorney when he asked the defendant on cross-examination if he had ever been convicted of a felony.

“Q. Have you ever been convicted of a felony?

A. Yes. But it is up on appeal.” (222)

When this question was asked appellant the prosecuting attorney who had prosecuted this appellant on an income tax violation was referring to the conviction in that case and, of course, knew that it was on

appeal to this court. This court has since reversed that case and set aside the conviction. That the question was improper and constituted prejudicial error can hardly be questioned. A judgment of conviction which is on appeal is not final.

Campbell v. U. S.

176 Fed (2nd) 45

U. S. vs. Empire Packing Co.

174 Fed 2nd, 17

16 Words and Phrases, permanent Addition p. 592

Pocket Supplement, 16 words and Phrases, p. 16

Frances v. Weaver, (MD) 25 Atlantic 413

Blaufus v. People (N.Y.) 25 Am Reports 148

Ashcraft v. State (Okla.) 94 Pac. 2nd 939 p. 945

Jennings v. State (Texas) 115 Southwestern 587

Ringer v. State (Texas) 129 Southwestern 2nd, 654

Adams v. State, 125 Southwestern 2nd, 397

We desire to quote at some length from the Campbell case *supra*:

“But it seems to us wholly illogical and unfair to permit a defendant to be interrogated about a previous conviction from which an appeal is pending. If the judgment of conviction is later reversed, the defendant has suffered, unjustly and irreparably, the prejudice, if any, caused by the disclosure of the former conviction. We therefore hold that the pendency of an appeal prevents the prosecution from proving a previous conviction for impeachment purposes; and that the District Court erred in admitting evidence concerning Campbell’s conviction when his appeal therefrom had not been determined.”

The following quotation from the Campbell case is particularly pertinent:

“* * * Necessarily the character of the proceeding, *what is at stake* upon its outcome, and the relation of the error asserted to casting the balance for de-

cision on the case as a whole, are material factors in judgment.” (citing 328 U. S. 762) (Emphasis supplied)

The methods by which the Court can determine if the error was prejudicial and would warrant a reversal is also discussed in the Campbell case:

“But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.” (citing 328 U. S. p. 764)

SUMMARY

At the outset we are compelled to admit that as to some of the errors complained of there was no proper objection or motions made by the appellant at the time of the trial. We are confident, however, that if this court after considering all of the evidence and the cumulative effect of the errors feel that the appellant did not have a fair and impartial trial that it will take notice of all the errors tending to effect the verdict.

A proper motion was made based upon the insufficiency of the evidence and a motion was also made asking that the evidence resulting from the search of appellant's premises be suppressed. (19-20) (23)

In the motion for a new trial and for an acquittal (23) the question of entrapment and the prejudicial questioning of appellant regarding the prior conviction were properly raised in the Court below. Although there was no objections to the question at the time it

was asked. The question in itself was not objectionable. It was not until the answer indicating that the only prior conviction was the income tax case that was on appeal that the counsel representing the defendant would know that the question was not proper. The attorney asking the question however did know and for that reason it was improper. After such a question is asked even though the answer is in the negative, or as in this case, answered and explained, there is no way in which the minds of the jurors can be disabused of the conclusion that the defendant has been found guilty of a serious crime. We sincerely urge that in the present case where the issue of appellant's guilt was so evenly balanced the fact of a conviction in the income tax case could have been the straw that threw the balance against the appellant.

The question of entrapment has been discussed at length elsewhere in this Brief. Risking the charge of unnecessary repetition we again call the court's attention to the long record of appellant as a practicing physician and failure of the Federal Officers after a vigil of three years to find a single violation. They finally resorted to an appeal by one of his patients to help the patient's brother. We submit that these facts paint a picture of illegal entrapment which the court ought to refuse to sanction. Primarily the administering of narcotics by a physician is a medical question and the courts should be slow to impose their views upon the medical profession. Doctors may differ among themselves as to their treatment in many cases. One Doctor may use a certain method, that there may be a better and safer method is not a sufficient reason for charging the Doctor with a felony.

In the present case as heretofore pointed out the two Doctors testified and agreed that the appellant's method

would be considered a treatment. One must have only a slight knowledge of narcotics and addicts to know that the amount of narcotics furnished by appellant in this case and the manner in which they were mixed by adding atropine, benedril and vitamins could not have been given for the purpose of satisfying an addiction.

In conclusion we contend that had it not been for the many prejudicial errors here complained of, the jury would have been justified in disregarding and probably would have disregarded much of the testimony of witness Cantu, and it is almost solely upon the testimony of Cantu that the Government's case rests.

We respectfully submit that this court order a dismissal of this case by reason of the illegal entrapment or in the alternative that this court give the appellant an opportunity to have his case submitted to a jury free from those prejudicial and confusing incidents contained in the record of this case.

Respectfully submitted,
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IN THE
United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Resisting Appeal from the United States District
Court for the Judicial District of Arizona

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IN THE
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BERNARD BLOCH,	}
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	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF OF APPELLEE

Resisting Appeal from the United States District
Court for the Judicial District of Arizona

DESCRIPTIVE STATEMENT OF CASE

1. Jurisdictional Statement.

The United States District Court for the judicial District of Arizona had jurisdiction hereof under *Title 18, United States Code, Section 3231*, and the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction hereof under *Title 28, United States Code, Section 1291*.

2. Statutes Violated.

The appellant, Bernard Bloch, was charged, in an indictment containing eight counts, by the grand jury of the Judicial District of Arizona, with the illegal acquisition of and sale of narcotic drugs. The illegal acquisition of drugs was charged under *Section 2554 (g), infra.*, and the illegal sale of narcotic drugs was charged under *Section 2554 (a), infra.* The counts alleging violation of *Section 2554 (g), infra.*, were dismissed in advance of trial (T.R. p. 17).^{*} The defendant was a medical man, an osteopath, and the allegations of the indictment were that the sales of narcotic drugs, above mentioned, were not pursuant to the Treasury Department Order Form, not pursuant to a prescription, and not in the regular course of the professional practice of this doctor (T.R. pp. 3, 6).

For the convenience of the court the following statutes are set forth, in pertinent part, verbatim:

“Section 2554. *Order forms—(a) General requirement.*

“It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose of the Secretary

“(c) *Other exceptions*

“(1) *Use of drugs in professional practice.* To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, or veterinary surgeon registered under Section 3221 in the course of his professional practice only: *Provided*, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed,

^{*}Unless the context indicates otherwise, the letters T.R. refer to Transcript of Record in the above numbered and entitled matter, and the numbers immediately after said letters, and numbers without other explanatory matter, indicate the page that is cited in the Transcript of Record.

showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in Section 2556.

“(2) *Prescriptions.* To the sale, dispensing, or distribution of narcotic drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under Section 3221: *Provided, however,* that such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further,* that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556”

Title 26 United States Code, 2554.

It will be noted that there are references, in the statute above set forth, to *Sections 3221 and 2556, Title 26 U.S.C.* It will be further noted that *Section 3221, supra*, refers to *Section 3220, infra*. The last two mentioned Sections relate to *Chapter 27, Internal Revenue Code, Special Occupational Taxes, Narcotics*.

Section 3221, supra, requires registration of persons engaging in the Special Occupations designated in *Section 3220; Title 26 U.S.C. Section 3220*, imposes a special tax upon wholesalers, dealers, and physicians who deal in narcotic drugs.

Section 2555, Title 26 U.S.C., requires the keeping of "records, statements" and the making of "returns" and provides further:

"... (c) *Returns by registrants of drugs received—*
(1) Requirement.

Any person who shall be registered in any internal revenue district under the provisions of section 3221 shall, whenever required so to do by the collector of the district, render to the said collector a true and correct statement or return, verified by affidavit, setting forth the quantity of narcotic drugs received by him . . ."

Section 2555, supra.

Section 2556, supra, provides in pertinent part:

"*Section 2556. Inspection and copies of returns, duplicate order forms, and prescriptions— (a) Requirements.* The duplicate order forms and the prescriptions required to be preserved under the provisions of section 2554 (c) (2) and (e), and the statements or returns filed in the office of the collector of the district, under the provisions of section 2555 (c), shall be open to inspection by officers, agents, and employees of the Treasury Department duly authorized for that purpose; and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the sale, prescribing, dispensing, dealing in or distribution of narcotic drugs . . ."

Section 3228, Title 26 U.S.C. defines narcotic drugs.

3. Endeavored Defense.

Several efforts were made by appellant to defend against the accusations of the indictment, the most notable are as follows:

The principal defense seemed to be the accusation, by defendant, at various stages of the proceedings that he was being “prejudiced,” together with the assertion that he was being “persecuted” for no good reason (T.R. pp. 122, 164, 166,—long period of investigation—, c. f. *Appellant’s Brief, bottom of page 9*; T.R. pp. 167, 169, 154, 155—reference alleged search and seizure—; T.R. 222, c.f. *Appellant’s Brief, page 15*—reference questions concerning prior conviction—).

The defendant endeavored a defense, in connection with his allegation that the narcotic agent, Mr. Reynaldo S. Cantu, was one of his patients, that the “morphine-sulphate” was always mixed with “atropine”, an alleged antidote (T.R. pp. 82, 84, 85). Even this asserted defense failed to encompass one of the exhibits, or one of the drug sales alleged as crimes in the indictment; this is government’s exhibit “6B”, *two tablets of dilaudid* (T.R. 57, 58, 106, 108). There is no testimony that the *dilaudid* was mixed with an antidote, nor that this was a “treatment” for any certain disease or alleged sickness.

The third asserted defense concerned the “reasonableness of the alleged search and seizure” (c.f. Motion for Suppression of Evidence, Affidavit, and Schedule of seized property, T.R. pp. 12, 13, 14; testimony—pp. 148, 149, 151-158; reference to warrant for arrest—pp. 161, 163). It will be noted, however, that no item of the “schedule of seized property” (T.R. pp. 14, 15) was admitted in evidence against the defendant. The patient card, allegedly properly a part of Item No. 8 in seized property, which was admitted in evidence, was submitted for evidence by the defendant, himself; it is defendant’s exhibit “A” (T.R. pp. 207-209).

4. Pages of Transcript of Record upon which Appellee Relies in this appeal.

Appellee relies, to resist this appeal, on those pages of *Transcript of Record* referred to in *paragraph 5, pages 6 to 12, infra*.

5. Statement of Facts—Corpus Delicti.

The appellant, a man of preferred position (T.R. p. 177), and special consideration with special occupational privilege, *Title 26 United States Code, Sections 3220 and 3221*, sold narcotic drugs outside the regular course of professional practice (T.R. pp. 46, 49, 54, 56, 57, 59, 62, 65). With the exception of the first exhibit, government's exhibit "3", all of the narcotic drugs were sold directly to Mr. Reynaldo S. Cantu, a narcotics agent for the Bureau of Narcotics, of the United States Government (T.R. pp. 96, et seq.). Many questions upon cross-examination were directed to the asserted justification that the defendant, himself, believed that he was selling these drugs to a narcotic addict (T.R. p.p. 126, et seq.).

On September 23, 1953, Gilbert Hernandez, government informer, was observed as he went into defendant-doctor's offices, and as he came out; he delivered exhibit "3" to Mr. Cantu, who waited on the street near the doctor's office (T.R. pp. 96, et seq.). Exhibit "3" is morphine solution (T.R. p. 46), one cubic centimeter in volume (T.R. p. 68).

From the 23rd day of September, 1953, until the 19th day of November, 1953, purchases were made of government exhibits:

"3"—September 23, (T.R. p. 96), morphine solution (T.R. p. 46), approximately one cubic centimeter (T.R. p. 46), no quantitative analysis (T.R. p. 73);

- “4A”—September 24, (T.R. pp. 100,101), morphine solution (T.R. pp. 51, 54), approximately 10 c.c. volume (T.R. p. 74), containing one-eighth grain of morphine per cubic centimeter (T.R. p. 74), for \$40.00 (T.R. p. 101);
- “5A”—October 29, 1953 (T.R. p. 103), morphine solution (T.R. pp. 54, 104), 20 c.c. (T.R. p. 68), one-eighth grain of morphine per cubic centimeter (T.R. p. 74), for \$30.00 (T.R. p. 105);
- “6A”—October 30, (T.R. p. 105, et seq.), morphine solution (T.R. p. 58), 15 c.c. (T.R. p. 67), one-quarter grain morphine per cubic centimeter (T.R. p. 75), in connection with government’s exhibit “6B” below, purchased for \$40.00;
- “6B”—purchased at the same time as exhibit “6A”, derivative of opium (T.R. p. 58), two tablets (T.R. p. 106), purchased for \$20.00 (T.R. pp. 106, 107);
- “7A”—November 10 (T.R. p. 111), morphine solution (T.R. p. 60), 30 c.c. (T.R. p. 67), one-sixteenth grain of morphine per cubic centimeter (T.R. p. 75), for \$80.00 (but with a credit for 10 cubic centimeters more (T.R. p. 111);
- “8A”—November 16 (T.R. p. 112), morphine solution (T.R. p. 64), 8 c.c. (T.R. p. 67), one-eighth grain of morphine per cubic centimeter (T.R. p. 75), the execution of the credit for 10 c.c. of morphine solution mentioned in reference to “7A”, above, which was purchased for \$80.00 (T.R. p. 112);
- “9A”—November 19 (T.R. p. 113), morphine solution (T.R. p. 65, 66), 20 milliliters, or 20 c.c. (T.R. p. 67), one-eighth grain of morphine per cubic centimeter (T.R. p. 76), sold to agent Cantu for \$50.00, of recorded money (T.R. p. 115);

The marked money referred to in reference to government exhibit "9A", and the list of serial numbers of that money comprise government exhibits "10" and "11".

The agent, purchaser of the above mentioned narcotics, was not a patient of the doctor, did not have a government form or form provided by the Secretary of the Treasury for the purchase of narcotic drugs, never had a patient card made out for him, and was not sick (T.R. pp. 100, 129, 130, 150); the purchaser, the agent, never had a medical examination or physical examination by the doctor, defendant (T.R. pp. 108, 150); the purchaser, the agent, did not receive any of the narcotics, pursuant to, and did not and never had a prescription from another doctor which was delivered to the defendant (T.R. p. 118); all of the transactions, above listed, were consummated within the Judicial District of Arizona (T.R. p. 117).

Appellant complains that the aggregate of morphine sulphate or morphine solution in all counts of the indictment, amounts only to "90 cubic centimeters" (p. 14, Appellant's Brief), and that this was extended over a period of two months, and would not satisfy the cravings of an addict. The amounts of morphine solution, mentioned above, more nearly aggregate 106 cubic centimeters, and this court's attention is drawn to the fact that Counts IV and V of the Indictment refer to 30 c.c. of the narcotic drug, and in this case the two sales were upon the 29th and 30th days of October, respectively: The court's attention is further directed to the fact that between November 10th and November 19th, inclusive, a period of ten days, 73 c.c. of morphine sulphate were sold, together with two tablets of dilaudid.

Appellant also complains that this prosecution is the outgrowth of three years of investigation by federal

officers, or that it results "after a vigil of three years to find a single violation" (T.R. pp. 122, 164), (*Appellant's Brief*, p. 18). We believe this court will take judicial notice that investigative files are opened, in federal offices of investigation, upon the registration of a complaint or complaints, and they are closed after inactivity, in such a file, justifies its closing.

The morphine sulphate solution in the seven respective exhibits was purchased wholesale by the defendant at approximately \$1.00 or \$1.25 per 30 c.c. bottle (T.R. p. 211).

An additional fact notable, and here stated upon the best search that we could make of the record, is that nowhere does it appear that the defendant-doctor admitted or confessed the crime with which he was charged; notwithstanding this, upon application of defendant, the judge gave the following instruction to the jury, which, for the convenience of the court, is quoted below:

"... If you find beyond a reasonable doubt and to a moral certainty that from the evidence before you under the foregoing instructions that the sales and dispensations charged in the various counts of the indictment to have been made are not lawful, then the next question for your determination is whether or not the defendant can avail himself of the defense of unlawful entrapment.

"The law recognizes two kinds of entrapment, unlawful entrapment, and lawful entrapment.

"Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.

“On the other hand, where a person already has the readiness and willingness to break the law, (336) the mere fact that government agents provided what appears to be a favorable opportunity is no defense, but is a lawful entrapment....”

T.R. page 291

Concerning Alleged Search and Seizure

It has been noted that none of the items of *Schedule of Seized Property* (T.R. p. 13) was admitted in evidence. It is also notable, however, that Agent in Charge, Mr. Ross, testified concerning his examination of the patient cards; it is further notable that the appellant put one of the patient cards into evidence (defendant's exhibit “A”) (T.R. p. 163). In this connection, Agent Ross testified:

“... And I told him settle down a little bit, and we requested from him his records, his dispensing records, his narcotics stamp, his narcotics order form, and the narcotics that he had on hand in his hospital stock. We went to the Reception Room and he told me that his dispensing record was kept individually on little 3" x 5" cards on each patient.

“I asked him, and with his permission, I (169) took all of the cards to the office and he found all of his narcotics and gave them to me, and gave me his order forms, and gave me his narcotic stamp, special tax stamp....”

T. R. page 162.

And further:

“... Q. He wasn't antagonistic, then, at this time, about your requesting those things and taking them from his possession?

A. No. He gave them to me.

Q. And you did examine those patient cards, or dispensing records?

A. Yes, I made a compilation of inventory of the narcotics which he had dispensed over the past two years. (170)

Q. And in your examination, did you find a patient card, or a dispensing card for Reynaldo S. Cantu?

A. No, I did not.

Q. Then what did you do with those dispensing records, or patient cards?

A. After I made my calculation, Doctor Bloch came to the office the next morning, and I returned them to him. . . .”

T.R. pages 162, 163.

At the time of the search the agents had no search warrant (T.R. pp. 139, 167). The agents had had issued a warrant for the arrest of the defendant (T.R. p. 161). There was evidence that there was no search at all, particularly not a general search (T.R. pp. 162-169). Mr. Welsh, who is quoted in Appellant’s Brief, testified on *page 155, Transcript of Record*:

“... Q. Where did you go after you searched Doctor Bloch?

A. Well, I went with Doctor Bloch wherever he went. . . .”

The defendant then was not acting under compulsion.

INTRODUCTION TO ARGUMENT

In *Appellant’s Brief*, specifications of errors Nos. I and V are argued together; specification of error No. VI is argued next; specifications of error Nos. II and III are argued together; and specification of error No. IV is argued last. The specifications are therefore, susceptible of classification under four general headings, which are presented in the Appellant’s Brief as follows: (1) Unreasonableness of search and seizure, failure to

suppress evidence: (2) Assertion that this case proves "illegal entrapment", as a matter of law: (3) Insufficiency of evidence to connect the defendant with exhibit "3" and exhibit "4A", and alleged failure to prove criminal intent, or wilfulness, in connection with an asserted defense "the regular course of business": (4) Misconduct of the Assistant United States Attorney, in relation to questions on cross-examination concerning prior conviction.

In this brief, if it please the court, may we argue the respective points in the order above mentioned.

ARGUMENT ON SPECIFICATIONS NOS.

I and V

(Alleged search and seizure)

Initially, we are at a loss to understand how a cogent assignment of reversible error can be hypothecated upon a failure to suppress evidence which was never identified nor admitted in the case in chief against the defendant-movant. It is admitted, however, that Agent Ross testified concerning the results of his examination of the patients' cards. This was not, however, until after the defendant had opened up the question of the alleged patient card on "Raymond Cantu Portillo", and asked Agent Cantu, on cross-examination, if he would be surprised if there were a card with that name. For the convenience of the court this testimony is contained, with respect to Agent Cantu, on *Page 127 of Transcript of Record*, while the testimony of Mr. Ross, in this connection, is contained on *Page 162 of Transcript of Record*.

Proposition of Law No. 1: A duly authorized narcotic agent may testify concerning information gained upon the examination of the patient cards of a doctor, if those

patient cards constitute "dispensing records" relating to the dispensation of narcotics under special tax stamp, where the examination of said dispensing records is incident to a legal arrest of the doctor for a violation of the federal narcotics laws.

In view of the extensive treatment of narcotics, in the sale and distribution thereof, in *Title 26 U.S.C.*, and the regulations imposed upon persons to whom are issued "special tax stamps", it seems that some variation of *Proposition of Law No. 1* is essential to the effectuation of fairly manifested legislative intent.

Section 2556, Title 26 U.S.C. supra
(quoted extensively on page 4 hereof)

There was no evidence that the appellant did not state to Mr. Ross that the cards were his only dispensing records. Mr. Ross would examine them as a part of his duty under the statute above stated. If he can not state, in a trial of the practitioner whose cards he examined, that a violation of crime is reflected by those "dispensing records", then it is difficult to understand how the apparent purpose of the Congress of the United States, to regulate dealings in narcotics, is to be effectuated. This, together with other considerations, leads to the conclusion that the testimony concerning information gained from a perusal of the cards was admissible, in any event.

We urge that it was not error to deny motion to suppress evidence, and that it was not error to permit testimony concerning information secured from "dispensing records".

A further consideration is that there was no objection to the testimony of Agent Ross concerning the information he gained from examining the cards (T.R. p. 163).

Proposition of Law No. 2: Circumstances regarding repeated purchases of narcotics apparently obtained from defendant, and events relating thereto, may establish probable cause and justify defendant's arrest and search of his premises without a warrant.

The above Proposition of Law is substantially verbatim syllabus No. 1 at *Page 74* of the following decision of the United States Court of Appeals for the Ninth Circuit:

McFarland vs. United States, 9th Cir. 1933, 65 Fed. 2d 74.

Assuming for the moment for the purposes of argument, that evidence was actually seized, in a search actually had, and that the evidence was actually admitted in the trial of the crime charged; then the above rule of law would justify the denial of the motion to suppress evidence. The *McFarland Case, supra*, is less strong, we feel, in its circumstances justifying a search and seizure, than is the case at bar.

The point we wish to urge is that *not all searches and seizures* are prohibited: The *Fourth Amendment to the Constitution of the United States* prohibits only *unreasonable* searches and seizures. The opinion in the above-mentioned case contains the following:

“The motion to suppress and the overruling of the challenge to the sufficiency of the evidence were properly denied . . . in our opinion, the repeated daily purchase of narcotics, apparently obtained from Appellant and the events leading up thereto, as planned and witnessed by the agents, together with all of the facts disclosed by the record, were sufficient to constitute probable cause and justify the arrest and search. . . .”

Ibid. at page 75.

One of the significant circumstances which makes the case at bar a stronger case than the *McFarland Case*, *supra*, is the fact that in that case all of the sales were made through a man by the name of "Rumbaugh", an informer. In the present case it is notable that the felony was committed in the presence of an officer, the defendant dealing directly with an agent of the Bureau of Narcotics of the Phoenix Office; in this case there was commission of a felony in the presence of an officer within three minutes of the time of arrest (T.R. p. 213).

Proposition of Law No. 3: The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest was made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed . . . is not to be doubted.

The above *Proposition of Law No. 3* is a quotation of the pertinent part of the holding in *Agnello vs. United States*, 1925, 269 U.S. 20, at page 30. In that case, the above Proposition of Law was dictum, as is pointed out in the dissenting opinion of the following cited case:

United States vs. Rabinowitz, 1949, 339 U. S. 56, at page 61.

The above Proposition of Law is well within the confines of the holding of the majority opinion of the last cited case. So far as we can determine the *Rabinowitz Case*, *supra*, is still the law (through April, 1955). This case contains a rather complete analysis of the decisions by and through which the above mentioned rule of law has developed:

c.f. Marron vs. United States, 275 U.S. 192.

Trupiano vs. United States, 334 U. S. 699.

The last mentioned case was overruled, in pertinent part, by the *Rabinowitz Case*, *supra*, in language that is contained on *pages 63, and 64, 339 U.S.*

May we call attention to the fact that the *Rabinowitz Case* also overrules the more pertinent portions of the case, *Go-Bart Importing Co. vs. United States, 1930, 282 U.S. 344*, which is cited by appellant. The *Rabinowitz Case*, majority opinion, seems to represent the law in this field of jurisprudence and justifies search of premises in the immediate control of a defendant legally arrested, and justifies the seizure of the implements of the crime.

Taking the circumstances of the case at bar, in the light most appealing to the motion to suppress evidence and the appellant's specifications of error, the patient cards were "implements of the commission" of the crime alleged: Did not the defendant himself describe them as his "dispensing records", kept in the regular course of business? The jury found that he was in the process of selling narcotic drugs "outside the regular course of his business". Defendant himself offered one of the cards as evidencing the dispensation of narcotic drugs.

We urge that the cards would have been admissible in evidence, and were not subject to the motion to suppress evidence; that the information gained by the agent by examination of the cards was admissible; no error was committed in denial of the motion to suppress, nor in the admission of the evidence.

ARGUMENT RESISTING SPECIFICATION NO. VI

(Entrapment)

Proposition of Law No. 4: Where a defendant denies the commission of an offense there is no issue as to

“illegal entrapment”, and he is not entitled to an instruction thereon.

The defense, “illegal entrapment”, may arise upon the assertion by a defendant that he committed the crime, but that he was induced so to do by illegal actions of government agents. It is the writers understanding that where a defendant denies the commission of an offense an essential element is missing from an alleged defense, “illegal entrapment”.

Bakotich vs. United States, C.A. 9th Cir. 1925, 4 Fed. 2d 386.

In consonance, however, with the other protections afforded this defendant, characterizing the trial as abundantly fair, the Honorable Trial Court gave an instruction upon illegal entrapment in the case at bar (T.R. p. 291 quoted on pages 9, 10, this Brief).

The Appellant cites no case authority for his proposition that the case at bar was a case where there was “illegal entrapment” as a matter of law. We believe this is because no cogent authority for this proposition is available where facts relating to such a defense are at issue.

Proposition of Law No. 5: If the defense, “illegal entrapment”, fairly becomes an issue in a criminal case, this issue is for determination by the jury, under appropriate instructions.

West Federal Digest, Criminal Law, Key No. 739 (1).

We urge the court that the issue of “illegal entrapment” was not raised in the case at bar. The instruction given, as were all of the instructions, and each of them individually, was abundantly fair to the defendant.

Sorrels vs. United States, 1932, 287 U.S. 435.

There was no error in refusal, by the court, to determine, as a matter of law, an "illegal entrapment" in the case at bar: The instruction given on "illegal entrapment" was abundantly fair to the defendant, and no error was committed thereby.

ARGUMENTS ON SPECIFICATIONS OF *ERRORS NOS. II AND III*

(Alleged failure to identify exhibits with defendant)

Appellant's argument on specifications numbered II and III contains, principally, the bald expression that the Trial Court erred in the denying of the motion for acquittal and the motion for new trial. No citation of legal case authority is contained in that argument (*Appellant's Brief, p. 11 et seq.*), and there are no propositions of law indicating upon what the appellant relies.

Proposition of Law No. 6: It is not essential that a government agent testify to personal observation of the handing of narcotic drugs to the purchaser thereof, by a defendant, in a case where the crime charged is the illegal sale of narcotic drugs; circumstantial evidence may identify the narcotic drug with the defendant, for submission of the issues to the jury.

It appears that one of the objections, in the specifications of error above mentioned, is that there was not direct testimony concerning the transfer of exhibit "3" from the defendant to the informer, Gilbert Hernandez. This objection is extended to exhibit "4A". Direct evidence of the transfer is not necessarily essential to the proof of the crime, illegal sale of narcotic drugs.

McFarland vs. United States, supra.

Appellant complains of a "studied effort to keep Hernandez from the witness stand" which does not seem to

be fair comment under the circumstances: For example: There is no testimony denying Hernandez's "addiction". It is judicially known, we believe, that narcotic addicts are unreliable. Subsequent filing of affidavit in connection with alleged newly discovered evidence (the irrelevance of which prevented the government from making a full response) raises the question now, as to whether or not the defendant should have put Hernandez on the stand to testify. Defendant admits Hernandez was under subpoena; the record shows he was not dismissed from court. The defendant claims to have known Hernandez for two years: And now he complains that the government should have sponsored the narcotic addict, Gilbert Hernandez.

c.f. Motion for New Trial, filed Ninth Cir. Court of Appeals, November, 1954. No. 14564.

We do not understand how Appellant can hypothecate prejudice or error, upon the fact that the government would not subscribe to the testimony of Hernandez. In *Statement of Facts—Corpus Delicti*, page 6, *This Brief*, we have set forth citations of *Transcript of Record* showing the facts proved constituting the corpus delicti. The evidence seems plenary, and the circumstantial evidence of the transaction with Hernandez, concerning exhibit "3", complete. Certainly the evidence identifying the defendant with exhibit "4A" is complete (c.f. T.R. p. 158). The Transcript of Record shows that after September 23, 1953, the date upon which exhibit "3" was acquired, seven items of narcotic drugs, on six different occasions, were received from the defendant by Agent Cantu. The defendant admits the principal circumstances attending each one of those transfers; his only denial seems to be that each of them was not a sale, but was a gift of narcotic drugs in connection with each of which the recipient donated a pay-

ment to the doctor upon the delinquent account of his alleged brother.

Referring again to *Statement of Facts, this brief, pp. 6-10* we urge the court that there was proof, abundant proof, of the corpus delicti of each of the crimes involved upon each of the sales as alleged in the indictment.

It is notable that the defendant sold 103 cubic centimeters of morphine sulphate, together with two dilaudid tablets, the morphine solution having been purchased at between three and four cents a cubic centimeter (about \$4.00, aggregate cost), for the sum of \$240.00, between the 23rd day of September, 1953, and the 19th day of November, 1953: This, by itself, indicates the sales were not in the regular course of professional practice.

We urge that no error was committed upon the admission of any of the items of evidence, and that in connection with the sale of each of the items criminal intent, knowledge, and irregularity was proved for submission to the jury. It was not error to deny motion for acquittal; neither was it error to deny motion for new trial.

ARGUMENT RESISTING SPECIFICATION OF ERROR NO. IV

Proposition of Law No. 7: A defendant who voluntarily assumes to testify in his own behalf, as any other witness, to test his credibility, may be examined on cross-examination as to prior convictions of crime.

The statement in *Proposition of Law No. 7*, above, seems to be the general rule.

It is also the rule followed in the Federal Courts:

Carlton vs. United States, 9th Cir. 1952, 198 Fed. 2d 795, (narcotics prosecution—prior state court plea of guilty to narcotics misdemeanor).

Shockley vs. United States, 9th Cir. 1948, 166 Fed. 2d 704, (murder prosecution—felonies, including murder proved, in face of contention one enough for credibility).

United States vs. Ugo Rossi, 2nd Cir. 1955, 219 Fed. 2d 612, (importations and sale of heroin — prior crimes, including misdemeanors, in Italy; defendant opened question on direct examination).

There is authority contrary to the above Proposition of Law; but there is more authority that the general rule, above stated, is to be qualified to permit cross-examination only on crimes involving “moral turpitude”, or “constituting felonies”, and/or upon crimes not too remote in time.

103 A.L.R. 363, *et seq.*

6 A.L.R. 1623, *et seq.*

This is sometimes called the minority rule, or the *Texas Rule*.

103 A.L.R., *supra*.

It also was, at one time, the rule of the Territorial Courts in the Territorial District of Arizona:

Lewis vs. Territory, (1900), 7 Ariz. 52, 60 Pac. 694.

The *Lewis Case*, *supra*, however, was decided under a particular statute which was construed as authorizing cross-examination only on “all of the facts to which he has testified, tending to his conviction or acquittal”; the omission from said statute of some such expression as “upon his credibility” was deemed to exclude this subject matter of cross-examination.

More recent decisions, in the State of Arizona, indicate that the general rule is followed in Arizona:

West vs. State, 1922, 208 Pac. 412,
(Murder—felonies).

Hadley vs. State, 1923, 212 Pac. 458,
(Murder—felony).

Johnson vs. State, 1928, 264 Pac. 1083,
(prior convictions of misdemeanor and two felonies proved; subject matter opened up on direct examination).

Proposition of Law No. 8: As evidence of credibility, defendant-witness may be cross-examined upon prior conviction of felony, or crime involving moral turpitude, even though conviction is on motion or upon appeal, for the conviction of crime is a verity, until set aside.

The rule of law, first above mentioned, is subject to some disputation. A very extensive line of authority, representatives of which are cited in the following paragraphs, support the rule without equivocation. There is a line of authority that denies the propriety of such a statement of law. The first two cases, hereinafter cited, are Federal Cases, respectively representing each side of this disputation. These cases are also cited in the *Appellant's Brief*, at page 16 thereof.

Empire Packing Co. vs. United States, C.A. 7th Cir. 1949, 174 Fed. 2d 16.

Campbell vs. United States, C.A.D.C. 1949, 176 Fed. 2d 45.

Upon this point we find only two federal cases, our search encompassing decisions of the federal courts reported in *West's Digest System*, through page 464 of 220 Fed. 2d Reporter.

The circumstances of the prosecution and the incidents of the principal crime alleged in the *Empire Case*, *supra*, seem to qualify it more nearly as a case in point with the case at bar, than do the circumstances and incidents of the prosecution in the *Campbell Case*, *supra*. For example: the *Campbell case*, in principal allegation, involved crimes of violence, assault with intent to commit rape, and simple assault; the *Empire Case* involves an indictment brought for the "filing false claims for government subsidies with the Defense Supplies Corporation", a crime other than a crime of violence, as is the case at bar: Though in both crimes (in the cases referred to) there is necessity of proof of criminal intent, even as there is in the case at bar, still, like the case at bar, in the *Empire Company Case* reliance for conviction is not so principally upon proof of a "quality of mind": In a trial for "assault with intent to commit rape" a defendant is entitled to make argument that the accusation "is easy to make and difficult to defend against", and has been held to be entitled to a jury instruction to that effect, *Campbell*, 176 Fed. 2d at page 46, while the same observation should not be made concerning the crime alleging, as to a doctor, "sale of narcotics not in the regular course of professional practice", as in the case at bar: The verdict in the *Campbell Case* relied upon the "*evidence of two small girls who were the victims of the assaults. . .*", and the testimony of children of tender years is acknowledged to be entitled to *special considerations*, whereas this special quality is present in neither the *Empire Company Case*, nor the case at bar: The treatment of this subject matter in the *Campbell Case* was dictum, not being necessary to the affirming of the judgment, while the treatment of this subject matter in the *Empire Company Case* was not dictum, but was part and parcel of the basis for the affirmance of the judgment.

The above list of the characteristics of the two cases, which we urge give to the *Empire Company Case*, *supra*, a greater cogency and force in the consideration of the case now on appeal, is not conceived to be all inclusive, for we feel this court will find other characteristics of that case that make it more pertinent to the circumstances in this case.

There are certain qualities, of the *Campbell Case*, however, which seem to qualify it, in some aspects, as a stronger case than the *Empire Company Case*, in application to the case at bar. One of these is the fact that the *Campbell Case* was tried to a jury, while the *Empire Company Case* was tried to the judge. At most, however, we feel that this only requires that further citations of authority be searched to establish which is the better rule.

There is no dearth of authority, in support of the *Empire Company Case* in decisions of supreme courts of the various states. May we first consider those cases cited on page 16, *Appellant's Brief* to the proposition that cross-examination upon prior convictions, if such are on appeal, is improper and/or constitutes misconduct:

First it should be said that there is no citation in the Appellant's Brief to the proposition that the asking of questions concerning prior convictions, even if on appeal, is "misconduct".

There are two state case citations, only, in Appellant's Brief, page 16, which treat the question with which we are here concerned.

Jennings vs. State, Texas 1909, 115 S.W. 587.

Ringer vs. State, Texas 1938, 129 S.W. 654.

The second of the last two mentioned cases was a prosecution for receiving and concealing stolen sheep,

in the number of some 600, which allegedly were the property of many persons, and had been allegedly stolen in a neighboring county. The defendant was asked if he had been convicted of a felony of stealing sheep in "Nolan County", to which he answered, "yes," "but it is on appeal". In holding that this line of questioning was improper, and reversing the conviction that had been had in the cited case, the Appellate Court seemed to be concerned, also, that the testimony was to be used as original evidence of his guilt of principal violation.

Ibid. at page 656.

It is quite obvious that the testimony concerning "conviction for stealing the sheep", when asked in a prosecution for the "receiving of stolen sheep" would likely be used by the jury as "evidence of guilt in the case" being considered. The same implication does not arise in the case at bar, concerning the questions that were asked. In this case the question was solely for use in testing the credibility of the witness-defendant (c.f. quote, *pages 30, 31, This Brief*). Furthermore, in the case at bar, there was no objection to the questions asked, and the answer was fully explanatory. A particular objection was had in the above mentioned *Ringer Case, supra*.

Jennings vs. State, Texas 1909, 115 S.W. 587, was a prosecution for sale of intoxicating liquors and violation of the local option laws. Conviction was had: Appeal was, amongst other things, upon the question as to whether or not the defendant-witness could be questioned "have you not been before convicted of violating the local option law in this very court?" In this case it was held that the testimony might have been used as "original evidence of his guilt", and was therefore held cause for reversal.

Ibid. page 588.

Each of these cases is representative of the "Texas Rule," one probably constituting the origin of that rule.

We feel that there is other authority to the proposition that such cross-examination, when the conviction is upon appeal, is improper, than is contained in the above mentioned citations to the two Texas cases. We feel that there is more authority, however, to the contrary; that is that such cross-examination is proper. We cite some of these cases in the following paragraphs, not upon the basis that they are the most cogent authority, but upon the basis that they are those which time and space permit:

In the case of *People vs. Rogers, California 1931, 297 Pacific 294*, it was held:

"... the defendant having voluntarily testified in his own behalf, it was proper for the prosecution to show, either by his cross-examination or by the record of judgment, that he had theretofore been convicted of a felony. *People vs. Soeder, 150 Cal. 12, 21, 87 Pacific 1016*. It has been held that a witness may be asked upon cross-examination whether he had been convicted of a felony, where a conviction had been had by verdict of a jury, but sentence had not been pronounced. *People vs. Ward, 134 Cal. 301, 66 Pacific 372*. *Since such evidence of conviction is only for purposes of impeachment and goes only to the matter credibility of the witness, we see no reason why the mere pendency of appeal should effect the question of the admissibility of the impeaching evidence.*" (Emphasis supplied) *Ibid.* at page 926

In the case of *In re Abrams, Ohio, 1930, 173 N.E. 312*, appears the following:

"During the course of hearing after the committee had rested its case, Abrams took the stand in his

own defense, . . . and then it was asked on cross-examination whether or not he had not been *convicted* of a crime of subornation of perjury. This was objected to, and the court overruled the objection, and the writer of this opinion thinks properly, for it tends to bear upon the credibility of the character of the witness. I do not know of any criminal case where a man charged with a crime, who takes the witness stand, cannot be asked on cross-examination whether he has been convicted of a felony . . .”

“(5) Now the claim is made that, in as much as the case was still pending at that time in the court of appeals, in the question and the answer to it were improper. We do not think so. Counsel for the accused rightfully did ask and get into the record the fact that case was still pending in the court of appeals but as the record then stood, the accused was convicted of a felony, and this court knows what happened to that case of conviction, for I, myself, wrote the opinion reversing the judgment of conviction . . .”.

Ibid, at page 314

We cite one more case to the general proposition.

Williams vs. State, Oklahoma 1924, 193 Pacific 223.

We have quoted extensively from opinions of Appellate courts in the States of California and Ohio, which seem to be the best available authority upon the questioned proposition. We urge the court that they represent the majority rule, and the better rule, upon the question of the propriety of cross-examination of a witness-defendant upon prior conviction of crime, where that prior conviction is up on appeal.

We urge this because of the limited use that is being made of the testimony ; it is only offered for the purpose of testing credibility. That is the circumstance in the present case.

A further consideration upon which we believe that the federal rule is as stated in *Proposition of Law No. 8*, above, is that the contrary rule is fraught with dangers of mistakes that will result from a usual understanding of the meaning of words. For example, in this case:

The danger was not made apparent to the trial court: He had no opportunity nor cause to rule upon the present question, except after trial and to the discard of several trial days: Counsel for defendant made no objection:

Counsel for the defendant had no thought of an accusation of impropriety, and no thought of an accusation of misconduct, at the time the questions were asked:

T.R. p. 222

Then, upon re-direct examination, he further exposed the facts and circumstances concerning the prior conviction:

T.R. pp. 226 and 227, (hereinafter set-out, pp. 30-31).

Government counsel was extremely careful of conduct, as is demonstrated by the record as a whole, and did not conceive that the question would be a blemish on an otherwise good record:

This indicates a rather standard or usual interpretation of the words "judgment" or "conviction", whether that interpretation is technically right or wrong. Assuming the rule to be other than we have urged it, *Proposition of Law No. 8*, then this inadvertant mistake, resulting from the usual interpretation of language, would occur more often. A rule of law which does not give full weight to the understanding of persons, generally, particularly when it uses words or terminology with which people, generally, are familiar, is not necessarily the best rule of law.

We urge, therefore, that the above stated Proposition of Law is the better rule, and we further urge that it should be the rule in this case: The cross-examination was neither improper, mis-conduct, nor prejudicial, and no error can be based thereon.

Proposition of Law No. 9: Though it may not be the better practice to permit cross-examination of defendant-witness upon prior convictions of crimes, where such prior conviction is under an appeal, slight irregularities or variances which do not affect substantial rights do not require reversal of a verdict and judgment which are justified upon the law and evidence.

The above rule of law, *Proposition of Law No. 9*, is only a restatement of *Rule 52(a), Federal Rules of Criminal Procedure, Title 18, U.S.C.* We urge that this rule is applicable to the facts and law of the present case, even if it is determined that it is improper to question, on cross-examination, a witness-defendant as to prior conviction which is on appeal.

Case authority, for the above mentioned rule, is best represented, for the case at bar, in the federal case above referred to:

Campbell vs. United States, supra.

In this case, it will be noted, though irregularity was noted in the opinion, the conviction of the reported case was affirmed, upon the ground that substantial justice had been accomplished.

In the face of the abundant evidence of guilt of the crime charged, in the present case, the repeated sales of narcotic drugs to an undercover agent, and the extensive evidence of circumstances indicating that the sales were not pursuant to professional practice, we urge that the slight deviation, if any this court believes there was in the cross-examination above referred to,

was not of significant proportion. We do not understand how it could be otherwise, in view of the following testimony in court at trial hereof:

“ . . . Q. Have you ever been convicted of a felony?

A. Yes, but it is up on appeal.

Q. You answered a question to the Judge concerning what one of these bottles would cost. Which bottle was it, if you will recall?

A. That 30 c.c. vial, any one of those big bottles there.

Q. Any one of the these big bottles like this?

A. Yes.

Q. This bottle would cost you wholesale what?

A. Approximately a dollar, a dollar and a quarter.

Q. Containing, as you have stated, both morphine sulphate, and another companion drug, atropine.

A. That is right.

Q. And you were selling them for twenty or fifty dollars?

A. I was not selling it.”

T.R. p. 222.

And further:

“ . . . Redirect examination.

Q. Doctor Bloch, you stated with reference to a felony. Is that in connection with income tax?

A. Yes, it was.

Q. And you were tried on two charges, is that correct?

A. That is right.

Q. And you were acquitted on the one?

A. That is right.

Q. And you have your case on appeal on (254) the other?

A. That is right.

Q. And how much is involved in that appeal?

A. A thousand dollars.

Q. A thousand dollars. And this is for what year?

A. For the year 1948.

Q. 1948? A. Yes.

Mr. Church: That is all.

Mr. Murlless: No further questions.

(Witness excused.) (255)''

We urge the court, therefore, that the cross-examination questions were not improper, were certainly not misconduct, and were surely not prejudicial; that in this connection no reversible error was committed by the Honorable Trial Court.

CONCLUSION

The evidence of guilt of the crime charged against this defendant seems overwhelming; the acquisition of that evidence was under methods acknowledged to be proper in the detection of narcotic violations and seizure of evidence thereof.

The conduct of the trial was without significant blemish.

The verdict of the jury reflects defendant's guilt, beyond a reasonable doubt.

Trial Court committed no reversible error: Neither in denying motions for suppression, for acquittal, nor for new trial.

Judgment should be affirmed.

Respectfully submitted,

JACK D. H. HAYS
United States Attorney
District of Arizona

ROBERT S. MURLLESS
Assistant United States Attorney
Attorneys for Appellee.

IN THE
United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

FILED

JUL - 8 1955

PAUL P. O'BRIEN, CLERK

FRANK E. FLYNN,
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IN THE
United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,	<i>Appellant,</i>	}
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

REPLY BRIEF OF APPELLANT

OPENING

While we believe that the questions discussed in the Government's Brief were anticipated in our opening Brief we think it might be of assistance to the Court to make some brief references to one or two of the points.

In reference to the amount of morphine distributed by Appellant, we admit a slight error in computing the total volume. However, we do not consider the number of cubic centimeters important. It is the morphine content that is important. For example, 30c.c., the amount alleged in Count V (9) containing 1/16th grain per

cubic centimeter would amount to less than two grains of morphine. While 10 c.c. containing $\frac{1}{4}$ grain per c.c. would amount to $2\frac{1}{2}$ grain.

We think the Government also fell into error in this matter. We quote from page 8 of the Government's Brief:

"this Court's attention is drawn to the fact that Counts IV and V of the Indictment refer to 30 c.c. of the narcotic drug, and in this case the two sales were upon the 29th and 30th day of October, respectively.""

Count IV alleged the sale of 10 c.c. of morphine on October 30.

Count II alleged the sale of 10 c.c. of morphine on October 29.

30 c.c. are mentioned in Count V and the sale was on November 10.

ILLEGAL SEARCH

The Government concluded that because the defendant did not physically resist the search by the officers and did not at the time proclaim his Constitutional rights and object to the search, that he thereby waived his right to contest the search. This reasoning is fallacious and the courts have repudiated it. In that connection we refer to our original Brief on page 5 and 6 and the authorities there cited. The quotation from the Judd case on page 9 is the answer to the Government's argument.

"Intimidation and duress are almost necessarily implicit in such situations."

In the McFarland case cited in the Government's Brief at page 14, there was an instruction submitted to the jury on the question of the legality of the search. In the present case the court assumed that the legality of the search was unimportant because the articles seized were not introduced in evidence. The point overlooked by the trial court was that the Government's witnesses were permitted to testify, basing their testimony upon what they learned by reason of the search.

ENTRAPMENT

The defense of entrapment was available to the Appellant. While he did not admit the commission of a crime he did admit most of the acts upon which the indictment was based. Illegal entrapment becomes a matter of law for the court to determine just like any other fact that affirmatively appears from the evidence.

In view of the past good record of the appellant we feel that we can safely say and the court could have safely said had it not been for the use of his patient Hernandez and the subterfuge practice by him in introducing Cantu there would have been no delivery of narcotics. It was because of the relationship of Doctor and patient existing between the defendant and Hernandez and the request by Hernandez that appellant was induced to furnish narcotics to Cantu (183).

PRIOR CONVICTION

Was it prejudicial error to ask appellant if he had ever been convicted of a felony? In reading the Government's Brief on this point, we cannot help but get the impression that the Government feels that it was error and an effort is made to minimize the effect of such error and the influence it might have had on the jury.

In a situation as grave as this and so important to appellant and the effect on his future so serious, we should give serious thought and study to this question. We can forget the immediate punishment and think of the effect on appellant's entire future. It would seem that any doubt should be resolved in his favor. We should not balance a man's future upon our power of divination or our ability to look into the minds of the jurors and say that they were not influenced.

The quotation from the Campbell case, Appellant's Brief 17,

***"If one is left in grave doubt, the conviction cannot stand."

We cannot subscribe to the refinement of reasoning used in the authorities cited by the Government when they say that since the evidence of prior conviction is only for the purpose of impeachment and goes only to the credibility of the witness, the mere pendency of an appeal does not effect the admissibility of the evidence. Such reasoning might possibly be applicable to a case where a witness was merely a witness and not the defendant. It is our position that the evidence is inadmissible even for the purpose of effecting the credibility of the defendant as a witness. Are we to be so naive that we can be asked to believe that any jury hearing this testimony would be able to consider it only for the purpose of effecting the credibility and not take it into serious consideration in determining the guilt or innocence of the defendant.

The case of *In re Abrams*, cited in the Government's Brief at page 26, was a disbarment proceeding brought against a lawyer. A committee was appointed by the court and when they made their recommendations and

reports there was a hearing before a court consisting of three judges. After discussing the errors assigned, including the one regarding the respondent's prior conviction, the Supreme Court said:

“But however, that might be the whole matter was a trial before a Judge or Judges and they were able to sift the wheat from the chaff and would not be unduly prejudiced one way or the other***”.

In *People v. Rogers*, 297 Pac. 924, cited in the Government's Brief at page 26, neither of the authorities referred to the quotation was there an appeal pending.

In *People v. Ward*, cited in the quotation from *People v. Rogers*, the question was asked of a witness not the defendant. The witness had been convicted but had not been sentenced and there was no appeal pending.

We respectfully submit that the appellant did not have a fair and impartial trial because of the cumulative effect of the errors complained of and had it not been for those errors we have reasonable ground to believe that there would have been no conviction.

Respectfully submitted,

FRANK E. FLYNN,
Attorney for Appellant,
202 Arizona Title Building,
Phoenix, Arizona

**In the United States Court of Appeals
for the Ninth Circuit**

BERNARD BLOCH, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

*On Appeal from the Judgment of the
United States District Court for the District of Arizona*

APPELLANT'S PETITION FOR REHEARING

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**In the United States Court of Appeals
for the Ninth Circuit**

BERNARD BLOCH, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

*On Appeal from the Judgment of the
United States District Court for the District of Arizona*

APPELLANT'S PETITION FOR REHEARING

Bernard Bloch, Appellant, respectfully requests and petitions this Court for a rehearing of this cause on the following grounds and for the following reasons:

This Court erred in that part of its opinion passing upon Appellant's Specification of Error No. IV. This Specification charges that prejudicial error was committed when the Assistant United States Attorney asked the defendant:

“Have you ever been convicted of a felony?”

The answer was:

“Yes, but it is up on appeal”.

The defendant had been convicted on one count of an indictment, which case was then on appeal and subsequently was reversed by this Court.

Bloch vs. United States
223 Fed. 2d 297.

This Court, in discussing Specification of Error No. IV, stated that a majority of the State Courts allow such a question even when the prior conviction is on appeal. That is true. However, there is a diversity of opinion in the State Courts and there is also an apparent conflict in the Federal Courts, one Federal case holding the question to be proper.

United States vs. Empire Packing Company
174 Fed. 2d 16.

The above case, however, was in a trial without a jury and can hardly be held to be binding upon the Courts of another circuit in a case tried before a jury.

The other Federal case held that the question was not proper impeachment and that the Court erred in admitting such evidence.

Campbell vs. United States;
176 Fed. 2d 45.

We respectfully submit that the rule in the Campbell case announces a sound principle of law that this Court should have followed in the present case.

This Court, in substance, held that the prosecutor acted in good faith and that, in view of the diversity of opinions, he was justified in concluding that the question was proper and well within the bounds of propriety. Such a conclusion by this Court leaves the propriety of the question judicially undecided insofar as this jurisdiction is concerned and leaves it up to each United States Attorney to determine the line of authority he will follow should the question arise in his District.

We are not primarily concerned with the good or bad faith of the prosecutor and, in determining the merits of Specification of Error No. IV on that basis, we are misinterpreting the purpose of the Specification. The Specification not only mentions misconduct but it directly charges that "prejudicial error was committed by * * * the United States Attorney in asking the defendant if he had ever been convicted of a felony".

If prejudicial error was committed it is immaterial, in so far as the damage to Appellant is concerned, whether the error was committed intentionally or innocently and in good faith.

Let us consider whether the question was prejudicial. The Government's case rested almost solely upon the testimony of the witness Cantu.

The defense rested upon the testimony of the defendant, Dr. Bloch.

The testimony of these two witnesses, in so far as most of the material facts are concerned, was very definitely

contradictory. The verdict of the jury would necessarily depend upon which witness they believed. Under such circumstances the impeachment of one of the witnesses would obviously be very damaging.

There is no doubt that the question was propounded for the purpose of impeaching Dr. Bloch. The verdict indicates that the attempt was successful.

This case cannot be disposed of by saying that the jury resolved the disputed testimony against the defendant. The query is immediately suggested: Would the verdict have been the same had not the testimony of Dr. Bloch been weakened by the question as to his prior conviction?

Prejudice is so apparent that this Court should take notice of the error even though not properly raised at the trial.

18 U. S. C. A.

Federal Rules of Criminal Procedure 52

This Court should determine the propriety or impropriety of the question asked this defendant.

If, as this Court says in its opinion, there is a diversity of opinions in both State and Federal Courts, then this Court should say which line of authority we are to follow in this jurisdiction.

We respectfully submit that this Petition for a Rehearing should be granted.

Respectfully submitted,

FRANK E. FLYNN
Attorney for Appellant
202 Arizona Title Building
Phoenix, Arizona

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded and meritorious and that it is not interposed for delay.

FRANK E. FLYNN
*Attorney for Appellant
and Petitioner*

**In the United States Court of Appeals
for the Ninth District**

BERNARD BLOCH, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

*On Appeal from the Judgment of the
United States District Court for the District of Arizona*

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

In the event this Petition for Rehearing should be denied it is the purpose and desire of Appellant to apply to the Supreme Court of the United States for the issuance of a Writ of Certiorari and for that reason application is hereby formally made for a stay of the issuance of mandate by this Honorable Court pending the presentation and determination of such Petition for Writ of Certiorari.

FRANK E. FLYNN
*Attorney for Appellant
and Petitioner*

No. 14537

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA for the Use of
WESTINGHOUSE ELECTRIC SUPPLY
COMPANY, a Corporation,

Appellant,

vs.

JOHN V. AHEARN, SR., an Individual Doing
Business Under the Firm Name and Style of
Ahearn Electric Company and THE AETNA
CASUALTY AND SURETY COMPANY, a
Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

FILED

JAN 7 1955

No. 14537

**United States
Court of Appeals**
for the Ninth Circuit

UNITED STATES OF AMERICA for the Use of
WESTINGHOUSE ELECTRIC SUPPLY
COMPANY, a Corporation,

Appellant,

vs.

JOHN V. AHEARN, SR., an Individual Doing
Business Under the Firm Name and Style of
Ahearn Electric Company and THE AETNA
CASUALTY AND SURETY COMPANY, a
Corporation,

Appellees.

Transcript of Record

**Appeal from the United States District Court for the
Western District of Washington,
Northern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

No. 3597

UNITED STATES OF AMERICA, for the Use
of Westinghouse Electric Supply Company, a
Corporation, and All Similarly Situated,

Plaintiff,

vs.

JOHN V. AHEARN, SR., an Individual Doing
Business Under the Firm Name and Style of
Ahearn Electric Company, and THE AETNA
CASUALTY AND SURETY COMPANY, a
Corporation,

Defendants.

COMPLAINT

For cause of action against the defendants, plain-
tiff alleges:

I.

Westinghouse Electric Supply Company is now
and was at all times hereinafter mentioned a corpo-
ration organized and existing under and by virtue
of the laws of the State of Delaware and a citizen
thereof, authorized to do and transact business in
the State of Washington, and that it has paid all
license fees due said state.

II.

That the defendant, John V. Ahearn, Sr., is now
and at all times hereinafter mentioned was a resi-

dent of the State of Washington, doing business under the firm name and style of Ahearn Electric Company in Bremerton, which is located in the Western District of the State of Washington, Northern Division. That the defendant, The Aetna Casualty and Surety Company, is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Connecticut and is a citizen thereof and is duly authorized and licensed to engage in the surety business in the State of Washington.

III.

That on February 8, 1952, the defendant John V. Ahearn, Sr., an individual trading as and doing business under the firm name and style of Ahearn Electric Company in the City of Bremerton, State of Washington, hereinafter called "contractor," entered into a contract (Contract No. NOY28688) with the United States of America, through the Civil Engineer Corps, United States Navy for Chief of Bureau of Yards and Docks, as the contracting officer, by which the contractor agreed:

"The contractor shall furnish the materials and perform the work for major repairs to electrical distribution, Quarters Area at the Puget Sound Naval Shipyard, Bremerton, Washington, complete and ready for use for the consideration of \$58,138.85, in strict accordance with the specifications, schedules, and

drawings, all of which are made a part of Specification No. 30338.”

That said contractor as principal and the defendant, The Aetna Casualty and Surety Company, as surety, under date of February 8, 1952, furnished a payment bond to the United States of America in the sum of \$29,069.43, conditioned that:

“If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.”

That said bond was required under the contract above referred to and the statutes of the United States, being Title 40, U.S.C.A., Secs. 270a, 270b, and 270c.

IV.

That on or about March 11, 1952, the defendant, John V. Ahearn, Sr., an individual trading as and doing business under the firm name and style of Ahearn Electric Company, purchased from Westinghouse Electric Supply Company for use in performing and fulfilling said contract, a quantity of Latex insulated, lead covered, telephone cable, which said contractor used in the prosecution of the work provided in said contract with the United States of

America above referred to. That all of said telephone cable was delivered and furnished by said Westinghouse Electric Supply Company to said contractor in December, 1952, and one year has not expired after the date of the final settlement of said contract above referred to entered into between said United States of America and said contractor.

V.

That there is a balance due, owing and unpaid to Westinghouse Electric Supply Company of the sum of \$5,469.51, on account of said materials furnished by Westinghouse Electric Supply Company to said John V. Ahearn, Sr., an individual trading as Ahearn Electric Company which were used in the prosecution of the work provided in said contract above referred to.

VI.

That Westinghouse Electric Supply Company has no knowledge of any other suit or action having been brought on the bond herein above referred to and that this suit is brought by Westinghouse Electric Supply Company in its own behalf and also for all other persons who have furnished labor or material in the prosecution of the work provided for in the contract above referred to, who have not been paid in full therefor before the expiration of a period of 90 days after the date on which the last of the labor was done or performed by them or material was furnished or supplied by them, for which claim is made.

VII.

That the Westinghouse Electric Supply Company has incurred an expense of \$7.00 in obtaining certified photostatic copies of the contract and bond hereinabove referred to. That Westinghouse Electric Supply Company is entitled to be allowed a reasonable attorneys' fee to be fixed by the court, together with its costs and expenses in prosecuting this action and that the sum of \$650.00 is a reasonable sum to be allowed as attorneys' fees.

Wherefore, Westinghouse Electric Supply Company prays for judgment against the defendants, John V. Ahearn, Sr., an individual doing business under the firm name and style of Ahearn Electric Company, and The Aetna Casualty and Surety Company, a corporation, in the sum of \$5,469.51, together with interest at 6% per annum from January 1, 1953, until paid, together with \$650.00 attorneys' fees, \$7.00 cost for obtaining certified copies of contract and bond, and for such other and further relief as to the court may seem just and equitable.

EVANS, McLAREN, LANE
POWELL & BEEKS,

/s/ W. BYRON LANE,

/s/ RAYMOND W. HAMAN,

Attorneys for Westinghouse Electric Supply Company, Plaintiff.

[Endorsed]: Filed November 10, 1953.

[Title of District Court and Cause.]

ANSWER

Comes now the defendants above named and in answer to plaintiff's Complaint, admit, deny and allege as follows:

I.

In answer to Paragraphs I and II admit the same.

II.

In answer to Paragraph III, admit that contract NOY 28688 was entered into according to the terms and conditions thereof, but not otherwise with the United States of America by defendant, Ahearn Electric Company, and that the defendant, Aetna Casualty & Surety Company, as surety, furnished a payment bond in connection therewith in accordance with the terms and conditions of said bond, but not otherwise, and deny each and every other allegation therein contained.

III.

In answer to Paragraph IV admit that this action was instituted within one year of the date of final settlement of the contract mentioned and deny each and every other allegation therein contained.

IV.

In answer to Paragraph V deny each and every allegation therein contained and especially deny that there is due and owing plaintiff the sum of Five Thousand Four Hundred Sixty-nine Dollars

and Fifty-one Cents (\$5,469.51) or any other sum or sums whatsoever.

V.

In answer to Paragraph VII deny each and every allegation therein contained and especially deny that the expenses therein alleged were reasonable or necessary and especially deny that the sum of Six Hundred and Fifty Dollars (\$650.00) and costs or any other sum or sums whatsoever is a reasonable sum to be allowed plaintiff.

Wherefore, having fully answered defendants pray that plaintiff's Complaint be dismissed and that they have and recover their costs and disbursements herein.

HILE, HOOFF & SHUCKLIN,

By /s/ CLIFFORD HOOFF,

Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 28, 1954.

[Title of District Court and Cause.]

MOTION FOR ORDER AMENDING
COMPLAINT

Comes now the plaintiff and through its attorneys, Evans, McLaren, Lane, Powell and Beeks, moves the above-entitled court for an order permitting the plaintiff to file an amendment to its complaint filed herein, as follows:

That the last sentence in Paragraph VII, of plaintiff's complaint be amended to read:

“That Westinghouse Electric Supply Company is entitled to be allowed a reasonable attorneys’ fee to be fixed by the court, together with its costs and expenses in prosecuting this action and that the sum of \$1,500.00 is a reasonable sum to be allowed as attorneys’ fees.”

Also, that the prayer be amended accordingly.

EVANS, McLAREN, LANE,
POWELL & BEEKS,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 16, 1954.

[Title of District Court and Cause.]

NOTICE OF PRESENTATION OF MOTION

To John V. Ahearn, Sr., Defendant herein, and to
Clifford Hoof, his Attorney:

You Are Hereby Notified that at the commencement of the trial of the above-entitled action, now set for trial on June 15, 1954, we will present to the Court for its ruling the attached motion to amend plaintiff’s complaint herein.

EVANS, McLAREN, LANE,
POWELL & BEEKS,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 16, 1954.

[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION OF ORAL
DECISION AND ALTERNATIVE MOTION
FOR NEW TRIAL

Comes now Plaintiff and respectfully moves the above-entitled Court that it reconsider its oral decision rendered at the conclusion of the trial for the reason that it is contrary to the evidence and the law of the case.

In the alternative, and without waiving the above motion, plaintiff moves for a new trial.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ W. BYRON LANE,
Attorneys for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 23, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR RECONSID-
ERATION OF ORAL DECISION AND
DENYING MOTION FOR NEW TRIAL

The plaintiff's Motion for Reconsideration of Oral Decision and in the Alternative for a New Trial coming on regularly for hearing before the Honorable J. C. Bowen, United States District Judge

of the above-entitled court on the First day of July, 1954, plaintiff being present by W. Byron Lane, one of its counsel, defendants being present by Clifford Hoof, one of their counsel; the court having considered the Motion of the plaintiff and being satisfied that the same should be denied, Now, Therefore be it,

Ordered that plaintiff's Motion for Reconsideration of this court's oral decision in the above-entitled cause and in the alternative for the granting of a new trial be, and the same is, denied in whole.

Done in Open Court this 2nd day of August, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ CLIFFORD HOOF,

Attorney for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 2, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having come on regularly for trial before the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, Northern Division, sitting without a jury, on the 16th day of June, 1954, the plaintiff being present by W. Byron Lane, Esq., of Evans, McLaren, Lane, Powell & Beeks, attorneys for plaintiff; the defendant, John V. Ahearn, Sr., appearing in person and by Clifford Hoof, Esq., of Hile, Hoof & Shucklin, and Merrill E. Wallace, Esq., attorneys for said defendant; the defendant, The Aetna Casualty and Surety Company, a corporation, appearing by Clifford Hoof, Esq., of Hile, Hoof & Shucklin, and Merrill E. Wallace, Esq., attorneys for said defendant. Evidence having been introduced on behalf of the plaintiff and on behalf of the defendants, and the plaintiff and the defendants having rested, the Court having heard the argument of counsel and being fully advised in the premises now, therefore makes the following:

Findings of Fact

I.

Westinghouse Electric Supply Company is now and was at all times hereinafter mentioned a corporation organized and existing under and by virtue

of the laws of the State of Delaware and a citizen thereof, authorized to do and transact business in the State of Washington, and that it has paid all license fees due said state.

II.

That the defendant, John V. Ahearn, Sr., is now and at all times hereinafter mentioned was a resident of the State of Washington, doing business under the firm name and style of Ahearn Electric Company in Bremerton, which is located in the Western District of the State of Washington, Northern Division. That the defendant The Aetna Casualty and Surety Company is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Connecticut and is a citizen thereof and is duly authorized and licensed to engage in the surety business in the State of Washington.

III.

That on February 8, 1952, the defendant John V. Ahearn, Sr., an individual trading as and doing business under the firm name and style of Ahearn Electric Company in the City of Bremerton, State of Washington, hereinafter called "contractor," entered into a contract (Contract No. NOY29688) with the United States of America, through the Civil Engineer Corps, United States Navy for Chief of Bureau of Yards and Docks as the contracting officer, by which the contractor agreed: .

"The contractor shall furnish the materials and perform the work for major repairs to

electrical distribution, Quarters Area at the Puget Sound Naval Shipyard, Bremerton, Washington, complete and ready for use for the consideration of \$58,138.85, in strict accordance with the specifications, schedules, and drawings, all of which are made a part of Specification No. 30338.”

That the said contract referred to was introduced in evidence as plaintiff's Exhibit 18. That said contractor as principal and the defendant, The Aetna Casualty and Surety Company, as surety, under date of February 8, 1952, furnished a payment bond to the United States of America in the sum of \$29,069.43, conditioned that:

“If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereinafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.”

IV.

That the payment bond mentioned in the last preceding paragraph executed by the defendant, John V. Ahearn, Sr., as principal, and The Aetna Casualty and Surety Company, as surety, was executed in accordance with the terms and provisions of what is known as the “Miller Act,” being Sec.

270a and 270b, of Title 40, U.S.C.A. That the action herein brought was commenced by the plaintiff within one year of the date of final settlement of the contract mentioned in the last preceding paragraph.

V.

That the plaintiff's cause of action and evidence introduced in support thereof was for the purpose of collecting from the defendants the principal sum of (\$5,469.51) five thousand four hundred and sixty-nine dollars and fifty-one cents alleged to be due from the defendant, John V. Ahearn, Sr., for materials furnished by plaintiff to the defendant, John V. Ahearn, Sr., for performance of the work contemplated under the said contract heretofore mentioned. That the principal amount involved in this action constitutes the difference in price between paper covered lead sheathed telephone cable and latex covered lead sheathed telephone cable; the latter being a higher priced type of telephone cable. That the general specifications for the work to be performed under the contract hereinafter mentioned permitted the use of either type of telephone cable.

VI.

That on or about the 31st day of January, 1952, plaintiff furnished to the defendant John V. Ahearn, Sr., a quotation on various electrical materials at the request of said defendant for the purpose of the said defendant John V. Ahearn, Sr., bidding on the contract hereinbefore referred to. That the bid opening was at 2:00 p.m., February 1,

1952, at Seattle, Washington. That said quotation was introduced in evidence herein as plaintiff's Exhibit No. 3. That the said quotation with reference to telephone cable includes the following language:

“Shipment telephone cable, third quarter, 1953, prices billed will be those in effect at time of shipment. Orders on telephone cable should be placed direct with Graybar Electric Company, Seattle.” [The following appeared as an alteration on the original]: which last quoted statement is made with reference to paper covered telephone cable. [Initialed]: J.C.B.

That the testimony of the defendant Ahearn, which testimony was denied by plaintiff was that Merritt Upson, salesman for plaintiff, advised defendant Ahearn that the paper wrapped lead sheathed telephone cable could be obtained for defendant Ahearn in time for defendant Ahearn to complete his contract if he were successful in his bid, providing the entire order for electrical materials including telephone cable were placed directly with plaintiff corporation. The testimony of defendant Ahearn was that as a result of such representations he bid on work based on paper wrapped lead sheathed cable. That defendant Ahearn was a successful bidder on said work and on the 5th day of February, 1952, said Merritt Upson, salesman for plaintiff and acting upon behalf of plaintiff, took at defendant Ahearn's place of business at Bremerton, Wash-

ington a written order signed by defendant John V. Ahearn, Sr., for electrical materials to perform said contract, included in which was paper covered lead sheathed telephone cable. That said order was introduced in evidence as plaintiff's Exhibit No. 4 and the said order was accepted by plaintiff. That the said order, Exhibit No. 4, is the only document signed by the defendant John V. Ahearn, Sr., in connection with any orders for materials from the plaintiff corporation. That the said order did not include any order for latex covered lead sheathed telephone cable.

VII.

That the time for completion of the contract of the defendant John V. Ahearn, Sr., was in the month of August, 1952,

VIII.

In support of plaintiff's cause of action the plaintiff introduced the testimony of Merritt Upson, salesman for the plaintiff, who dealt with the defendant John V. Ahearn, Sr., the testimony of Edward Novich, an employee of the plaintiff, the testimony of Arthur L. Rockwell, an employee of defendant Ahearn on the work in question, who acted in the capacity on the work in question as foreman, and the testimony of Lawrence B. Blackman, likewise an employee of defendant Ahearn in support of the contention on the part of the plaintiff that the defendant John V. Ahearn, Sr., on the 10th day of March, 1952, ordered a change from paper covered lead sheathed telephone cable to latex

covered lead sheathed telephone cable at an increase in price amounting to five thousand four hundred and sixty-nine dollars and fifty-one cents (\$5,469.51), the principal amount herein sued for. The defendant Ahearn denied that he had ordered such a substitution. The testimony of Mr. Rockwell was introduced by way of deposition as was the testimony of Mr. Blackman. In addition to the testimony, at the time of trial, of Mr. Upson and Mr. Novich, portions of the pre-trial depositions of said Merritt Upson and Edward Novich were likewise used at the time of trial, in cross-examination of each of said witnesses.

IX.

That in the month of January, 1953, the plaintiff caused to be delivered to the defendant John V. Ahearn, Sr., at job site at the Bremerton Navy Yard, at Bremerton, Washington, latex covered lead sheathed telephone cable instead of paper wrapped lead sheathed telephone cable. That at the time of delivery of said cable the said completion date in connection with the performance of said contract by the said defendant Ahearn had been passed and the said latex covered cable was used to complete said work. That at or about the time of the delivery of said latex covered cable defendant Ahearn received from plaintiff an invoice for said latex covered cable which showed an increase in price over paper covered cable of the principal amount involved in this action. That the said increase in price and substitution of cable was protested by the defendant Ahearn prior to the use by

the defendant Ahearn of the substituted telephone cable.

X.

That the defendant Ahearn was instructed by the contract officer of the U. S. Navy to proceed with the installation of the latex covered cable and no increase in contract price was given to the defendant Ahearn by its use and the defendant Ahearn did not benefit by such substitution.

XI.

That this Court heretofore rendered its oral decision in this matter which is as follows, and is made a part of these Findings by the Court:

“From the standpoint of credibility and weight of testimony as among the several witnesses, this is one of the most perplexing cases submitted to this Court in recent times. Some one among the witnesses is obviously and knowingly not telling the truth, and I do not know who it is. There is too much conflict of testimony about the facts that should be clearly within the knowledge of these witnesses. There is no excuse for all this irreconcilability and positive conflict between the testimony of the various witnesses.

“We start out with the situation that the only contract or order bearing the definite signature of the defendant Ahearn is Plaintiff’s Exhibit 4, which was the original order and contract for this cable and which called for not the latex here in contro-

versy but paper-covered cable, which all agree was the subject of the original contract.

“Mr. Upson, the experienced salesman for plaintiff Westinghouse, claims to have received the latex-amending order direct from Mr. Ahearn, orally given by the latter, and that Mr. Upson did not take any signature for the substituted latex but wrote up a sort of field order form and later mailed a copy of it to Mr. Ahearn, the receipt of which Mr. Ahearn denies. Mr. Ahearn also denies he ever gave to Mr. Upson any order for the substituted latex cable.

“The testimony of Mr. Upson and Mr. Ahearn on whether or not Mr. Ahearn gave the order for a change from paper-covered to latex-covered cable is in direct conflict. Both are interested witnesses. One or the other of them is bound to be telling a falsehood and knows it. I cannot tell which one it is.

“Now, as to what importance the Court should attach to the testimony given by deposition by the witnesses Rockwell and Blackman, ordinarily one would suppose that they would have no motive to falsify. The fact is, however, that their testimony does not jibe with Mr. Upson’s testimony in several details and does not jibe with Mr. Ahearn’s testimony in other important details. There is the fact also that both of those witnesses seemed to have had an unfriendly critical attitude toward Mr. Ahearn. Irrespective of whether or not there was something

in the private or business life of Mr. Ahearn which justified to any extent such an attitude on the part of the witnesses Rockwell and Blackman, I believe their testimony was influenced by that attitude. I believe they were unfriendly witnesses, and I think the Court cannot rely upon their testimony to supply the missing link in the otherwise unconvincing testimony here on the plaintiff's side of this case.

“Since the parties placed enough importance on the original order to require it to be signed into express contract by the buyer Ahearn as well as the seller Westinghouse, it is not easy to see why it should not have been and was not just as important, if not more so, to have the buyer Ahearn sign the amending order substituting latex cable, in view of the fact that such substitution increased the originally agreed contract price by the substantial sum of \$5,469.51.

“The only convincing testimony which cannot be impaired in any way by other testimony now in the record is in defendants' favor and is Plaintiff's Exhibit 4 which is the original order and contract signed by Mr. Ahearn and which calls not for latex but for paper-covered cable. Other than that, all of the vitally material testimony in the case is so hopelessly in conflict and so obviously shows that some witness or witnesses have purposely, knowingly and wilfully falsified as to the material facts in this matter, that this Court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff's burden of proof

in support of the cause of action alleged in plaintiff's complaint.

"Plaintiff contends that, in any event, the evidence establishes an implied contract entitling plaintiff Westinghouse to a recovery against defendants. The defendant Ahearn, however, is not shown by the evidence to have received any greater benefit from the substitution of latex cable than he before the substitution had a contract right to receive from the use of paper-covered cable. Therefore, no implied contract liability is visited upon that defendant. No liability attaches to the surety defendant except as to liabilities of defendant Ahearn. The United States of America through the Navy Department is the only one whose position might be said to be better today by reason merely of the use on the job of latex instead of paper-covered cable, but no relief for or against the United States is sought here. In this action, plaintiff Westinghouse is not entitled to any recovery based on implied contract.

"It is the finding, conclusion and decision of this Court that the plaintiff take nothing by its complaint herein; that each party pay his and their own costs herein incurred; and that plaintiff's action be dismissed with prejudice."

(Interjection by Mr. Lane.)

"I am considering everything, and the Court's decision is now complete. I do not feel at liberty at this late hour to discuss it in any greater detail.

On all issues the Court decides in favor of the defendants because of lack of convincing proof and because the plaintiff has not sustained its burden of proof to establish the material allegations of the complaint by a preponderance of the evidence.”

Done in Open Court This 2nd day of August, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

From the Foregoing Findings of Fact the Court
Makes the Following Conclusions of Law:

I.

That no recovery of any kind should be allowed against the defendants, or either of them, based upon an express contract as alleged in plaintiff's complaint, nor upon implied contract.

II.

That plaintiff's complaint should be dismissed with prejudice as to the defendants and each of them.

III.

That each of the parties to this action should bear its or his own costs and disbursements.

Done in Open Court This 2nd day of August, 1954.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ CLIFFORD HOOFF,

One of the Defendants' Attorneys.

Receipt of Copy acknowledged.

[Endorsed]. Filed August 2, 1954.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 3597

UNITED STATES OF AMERICA, for the Use
of Westinghouse Electric Supply Company, a
Corporation, and All Similarly Situated,

Plaintiff,

vs.

JOHN V. AHEARN, SR., an Individual Doing
Business Under the Firm Name and Style of
Ahearn Electric Company, and THE AETNA
CASUALTY AND SURETY COMPANY, a
Corporation,

Defendants.

JUDGMENT OF DISMISSAL
WITH PREJUDICE

The above-entitled action having come on regularly for trial before the Honorable John C. Bowen,

Judge of the United States District Court for the Western District of Washington, Northern Division, sitting without a jury, on the 16th day of June, 1954, the plaintiff being present by W. Byron Lane, Esq., of Evans, McLaren, Lane, Powell & Beeks, attorneys for plaintiff; the defendant, John V. Ahearn, Sr., appearing in person and by Clifford Hoof, Esq., of Hile, Hoof & Shucklin, and Merrill E. Wallace, Esq., attorneys for said defendant; the defendant, The Aetna Casualty and Surety Company, a corporation, appearing by Clifford Hoof, Esq., of Hile, Hoof & Shucklin, and Merrill E. Wallace, Esq., attorneys for said defendant. Evidence having been introduced on behalf of the plaintiff and on behalf of the defendants, and the plaintiff and the defendants having rested, the Court having heard the argument of counsel and being fully advised in the premises, and having heretofore entered its Findings of Fact and Conclusions of Law, now, therefore, be it

Considered, Ordered and Adjudged that plaintiff's complaint be and it is hereby dismissed with prejudice and plaintiff take nothing thereby. Be it further,

Considered, Ordered and Adjudged that each of the parties hereto shall bear their own costs and disbursements.

Done in Open Court This 2nd day of August, 1954.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ CLIFFORD HOOFF,
One of the Defendants'
Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that United States of America, for the use of Westinghouse Electric Supply Company, a corporation, plaintiff herein, hereby appeals to the United States Court of Appeals for the 9th Circuit from the judgment entered in the above-entitled cause on or about August 2, 1954.

Dated at Seattle, Washington, this 30th day of August, 1954.

EVANS, McLAREN, LANE,
POWELL & BEEKS,
Attorneys for Plaintiff.

[Endorsed]: Filed August 30, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes Now the plaintiff-appellant, and states the following points upon which it will rely on appeal:

1. The court erred in its entry of findings of fact, conclusions of law and judgment of dismissal with prejudice of plaintiff's complaint.

2. The court erred in not entering a judgment in favor of appellant against the respondents as prayed for by plaintiff's complaint as amended.

3. The court erred in entering its order (minute entry of July 1, 1954, and written order of August 2, 1954) denying appellant's motion for reconsideration of court's oral decision and in the alternative for the granting of a new trial.

4. The court erred in finding and concluding in its Finding of Fact No. 10 that the appellee, John V. Ahearn, Sr., doing business as Ahearn Electric Company, was not liable to appellant for the cost of the latex telephone cable, sued for herein, under the theory of an implied contract, respondent having received from appellant and retained for his use the latex cable long after receiving the invoice therefor and with knowledge that the price of latex cable was \$5,469.59 (the amount sued for herein) more than the price for paper-wrapped cable quoted to him by the appellant.

5. The court erred in finding and concluding in its Finding of Fact No. 10 that the appellee did not benefit by the receipt of latex cable.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ W. BYRON LANE,

/s/ MARTIN P. DELETS, JR.

Receipt of copy acknowledged.

[Endorsed]: Filed September 24, 1954.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 3597

UNITED STATES OF AMERICA, for the Use
of Westinghouse Electric Supply Company, a
Corporation, and All Similarly Situated,

Plaintiff,

vs.

JOHN V. AHEARN, SR., an Individual Doing
Business Under the Firm Name and Style of
Ahearn Electric Company, and THE AETNA
CASUALTY AND SURETY COMPANY, a
Corporation,

Defendants.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

GEORGE F. SCHINDLER

called as a witness by and on behalf of plaintiff,
having been first duly sworn, was examined and
testified as follows:

Direct Examination

By Mr. Lane: [15*]

* * *

Q. Mr. Schindler, you have been handed what
has been marked Plaintiff's Exhibit 3. Would you
state what that is, please, if you know?

*Page numbering appearing at foot of page of original Reporter's
Transcript of Record.

(Testimony of George F. Schindler.)

A. That is a copy of my quotation on this particular job in question involving electrical equipment.

Q. And what is the date of that quotation?

A. January 31, 1952.

Q. And what were the facts and circumstances surrounding your preparing that quotation?

A. This is a typical job that we are called upon—that I am called upon—to quote on as to prices for the electrical contractor. It involves the search of specifications and blueprints on the particular job, getting information as to the electrical equipment involved on the job, and obtaining pricing information on that equipment to transfer on to the electrical contractor. [18]

* * *

Mr. Lane: I am reading now from page 3. [19]
It is a quotation of approximately 1500 feet of telephone cable, 6 pair, 19 ga., paper wrapped, lead covered, Western Electric Type ENB. The price quoted is \$16.50 per 100.

The Court: \$16.50 per 100?

Mr. Lane: Yes. The other item is approximately 1500 feet of the same type of cable except 26 pair, and the price quoted is \$37.90 per 100. The third item is approximately 1500 feet of the same cable except it is 51 pair cable, and the price quoted is \$61.20.

The Court: Per 100?

Mr. Lane: Per 100. Then follows this follow-

(Testimony of George F. Schindler.)

ing language: "Shipment—Telephone Cable"—this is all telephone cable we are referring to, your Honor—"3rd Quarter 1953. Prices billed will be those in effect at time of shipment. Orders on Telephone Cable should be placed direct with Graybar Electric Company, Seattle." Then further down at the bottom of the page the following language appears: "All the above quantities not guaranteed."

* * *

Q. Now, the specifications for this job provided for either this type of paper wrapped wire or latex wire, did it not? A. That is right.

Q. Were you requested to give a quotation on latex?

A. I do not recall having had a request on any particular type—that is, one or the other.

Q. Well, if you had had a request for a [23] quotation on latex, would there have been something in this quotation about that?

A. At this time, Mr. Lane, to my knowledge we did not have access to any telephone cable with latex covering. [24]

* * *

Q. Were you requested by any one from the Ahearn Company to later supply figures on latex, do you recall?

A. No, sir. I was not requested to supply any figures after the original quotation.

Q. After you made up that quotation which is Exhibit 3, what did you do with it?

(Testimony of George F. Schindler.)

A. I think the record in the inside folder will show that it was mailed to the contractor on the 2nd of February, I believe was the date.

The Court: Is that statement made with reference to Plaintiff's Exhibit 3?

Mr. Lane: Yes, your Honor.

The Court: Read the answer.

(The last answer is read by the reporter.)

The Court: To the contractor? Do you mean the defendant Ahearn?

The Witness: Yes, sir.

The Court: What year was it?

The Witness: 1952.

The Court: You may inquire.

The Witness: I might add, also, Mr. Lane, that those prices, according to the information which I have on the job folder, indicate that I phoned this information on the 31st, January 31, 1952. [25]

Q. (By Mr. Lane): To the Ahearn Company?

A. That is right.

Q. And you don't recall to whom you talked?

A. No, sir.

Q. And then you mailed it on the following day, is that right? A. Yes. [26]

* * *

(Testimony of George F. Schindler.)

Cross-Examination

By Mr. Hoof: [27]

* * *

Q. Your Mr. Upson, who is an employee of the Westinghouse Electric Supply Company, did not confer with you prior to the time you prepared the quotation?

A. No, sir. I don't recall any conversation with him on this.

Q. Now, what was the reason, Mr. Schindler, of placing on the third page of Exhibit No. 3 the language [29] "Orders on Telephone Cable should be placed direct with Graybar Electric Company, Seattle"?

A. Well, Mr. Hoof, the reason that was put on there is this: At that time on telephone cable—I might first state that it was very seldom I quoted on telephone cable, and when I think of telephone cable I think of Graybar. That was our only source of supply at that time to my knowledge, and as such I contacted the Graybar Company to get a price on this cable for this particular job, and there was no commission in that for us. I was merely quoting this cable as a convenience to the contractor. Therefore, I stated on the bid which you read a while ago that as far as the order, if it should materialize into an order, it should be placed direct with the Graybar Company. There was no commission in it for us because of that type of

(Testimony of George F. Schindler.)

cable. Therefore, as a convenience to the contractor, I obtained the price, and due to the fact that there was no commission in it for us on this type of cable I made the statement that the order should be placed direct with Graybar Company. [30]

* * *

MERRITT UPSON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * *

Mr. Lane: I would like the record to show, your Honor, that Exhibit 3, which has just been offered—and has it been admitted?

The Court: I do not believe so. Is there any objection, Mr. Hoof? [31]

Mr. Hoof: No objection to Exhibit 3.

The Court: Plaintiff's Exhibit 3 is now admitted. [32]

* * *

Q. (By Mr. Lane): What was your answer? I forget. Plaintiff's Exhibit 4 is what, Mr. Upson?

A. This is the original copy of an order that I wrote in Mr. Ahearn's place of business in Bremer-ton. [34]

Q. Under what date? A. February 5.

Q. Of what year? A. 1952.

(Testimony of Merritt Upson.)

Q. Did you go to Bremerton on that date?

A. Yes, sir.

Q. And you saw Mr. Ahearn at that time?

A. Yes, sir.

Q. And this was the order pertaining to these materials in connection with this contract?

A. Yes, sir. This was the first order.

* * *

Q. And that was obtained from his office and written up by you in your handwriting, do I understand? A. Yes, sir.

Q. And then who is it signed by, if any one?

A. Mr. Ahearn.

Q. Now, does that refer to what type of telephone cable?

A. Paper-wrapped, lead-covered.

Q. Is there any reference in there at all to latex? [35] A. No, sir.

The Court: Will you wait just a moment? Do you ever recall Mr. Ahearn asking you instead of the paper-wrapped cable to furnish him on this purchase order latex-wrapped cable?

The Witness: Not at this time.

* * *

Q. (By Mr. Lane): I hand you what has been marked Plaintiff's Exhibit 5 and ask you what that is, if you know.

A. Exhibit 5 is a rewrite on our order form of the Exhibit 4.

Q. And that was prepared by you?

(Testimony of Merritt Upson.)

A. Yes, sir.

Q. It covers the same items as in Exhibit 4? [36]

A. There may be a difference in item but it would be——

Q. Does it cover the same items generally that are in Exhibit 4?

A. Generally it covers the same items.

Q. After that was prepared, what was done with it, Mr. Upson?

A. This was mailed, or a copy was mailed, to Mr. Ahearn.

Q. By whom?

A. By myself.

* * *

Mr. Lane: I would like the record to show, your Honor, that at the time Mr. Ahearn's deposition was taken he did not produce a copy of this Exhibit 5 and that the copy that is now in court as Exhibit 5 is from the Westinghouse file. I believe that is correct.

Mr. Hoof: Well, I think that as long as we are proceeding this way, on statements, may the record likewise show that no subpoena was issued in the production of records at the time of Mr. Ahearn's deposition. [37]

* * *

Mr. Lane: All right. I would now like to offer both Exhibits 4 and 5 in evidence, your Honor.

The Court: Hearing no objection——

Mr. Hoof: There will be no objection to their admission.

The Court: Each of them is now admitted. [38]

* * *

(Testimony of Merritt Upson.)

Q. (By Mr. Lane): There has been handed you Plaintiff's Exhibit No. 6. What is that, Mr. Upson?

A. That is a letter answering a request from the Ahearn Electric Company on deliveries of material orders for this job.

Q. And that was written by whom?

A. By myself.

The Court: Do those materials include this cable in question?

The Witness: That is right, sir.

Q. (By Mr. Lane): And it covers delivery dates, does it, on this cable in question and on latex, is that not correct? A. Yes, sir.

Q. And you wrote that letter and handed it [41] to Mr. Ahearn, did you?

A. To the best of my knowledge I delivered it personally.

Q. On what date? A. February 19.

Mr. Lane: I would like to offer that letter in evidence.

Mr. Hoof: I have no objection.

The Court: Plaintiff's Exhibit 6 is now admitted.

(Plaintiff's Exhibit No. 6 received in evidence.)

The Court: You may inquire.

Q. (By Mr. Lane): Would you read to the Court the language there pertaining to the delivery dates of paper-wrapped cable or latex cable?

(Testimony of Merritt Upson.)

A. Western Electric Telephone Wire, 6 pr., 26 pr. & 51 pr. paper and sheath, Third Quarter, 1953.

Q. That is the delivery date?

A. That is the delivery date, yes, sir. Do you want it on the latex?

Q. Yes.

A. U. S. Rubber Latex Telephone Wire 6 pr., 26 pr. [42] and 51 pr., Third Quarter, 1952. "U. S. Rubber take exception to sub paragraph 'B' under Paragraph 5-09 in that the Mutual capacitance of their wire is .115 MFD instead of .090 as specified."

Q. Was that the first time that you had any contact with Ahearn relative to latex-covered wire?

A. On latex, yes, sir.

Q. And at that time where did you see Mr. Ahearn?

A. At his place of business.

Q. And you say that was February——

A. 19.

The Court: Will you pause for a moment? What city was that?

The Witness: Bremerton.

The Court: You may inquire, Mr. Lane. Was that 1952?

The Witness: Yes, sir.

Q. (By Mr. Lane): Now, Mr. Upson, at that time, do you recall whether a price of latex cable was discussed at that time?

A. To the best of my knowledge, there was no price discussed.

Q. Had you at that time received a quotation

(Testimony of Merritt Upson.)

from the U. S. Rubber Company as to the [43] price?

A. Yes, sir.

Q. You had received at the time?

A. No, not at the time of the writing of this letter.

Mr. Lane: Will you mark this?

The Clerk: Plaintiff's Exhibit No. 7.

(Quotation U. S. Rubber marked Plaintiff's Exhibit No. 7 for identification.)

Q. (By Mr. Lane): Mr. Upson, I will ask you whether or not you recall calling the Westinghouse office from Mr. Ahearn's place of business on February 19 to ascertain if they had received a quotation on the price of latex from the United States Rubber Company?

A. To the best of my recollection I can't answer that.

Q. I show you what has been marked as Plaintiff's Exhibit 7 and ask you to state what that is, if you know.

A. That is a quotation from the United States Rubber Company on the latex wire in question.

Q. Dated what date? A. February 18.

Q. And does that show what date it was [44] received by Westinghouse?

A. It was received by Westinghouse on February 19. It looks like 8:00 a.m. [45]

* * *

Mr. Lane: I will offer that letter in evidence, your Honor.

(Testimony of Merritt Upson.)

The Court: Admitted.

(Plaintiff's Exhibit No. 7 received in evidence.)

The Court: I note the word "quotation" on the form on which Exhibit 7 is written, and I wish you would tell the Court what kind of quotation it is, quotation of what, for what kind of material, if any.

The Witness: That was for the latex telephone wire.

Q. (By Mr. Lane): Quotation from whom, Mr. Upson? A. U. S. Rubber Company.

Q. And they are the only people that manufactured latex at that time, were they?

A. At that time, as far as I know. [46]

* * *

The Court: You may inquire.

Mr. Lane: I will ask counsel if they have a copy of Mr. Ahearn's letter to the Navy under date of February 19, 1952?

The Court: In that connection, do you demand that it be produced?

Mr. Lane: Yes, your Honor.

The Court: You have not said so. Be specific, Mr. Lane.

Mr. Lane: It was covered in our subpoena.

Mr. Hoof: What is the date, please?

Mr. Lane: February 19, 1952.

Mr. Hoof: Here it is.

(Testimony of Merritt Upson.)

The Clerk: Plaintiff's Exhibit No. 8.

(Copy of letter marked Plaintiff's Exhibit No. 8 for identification.)

Mr. Lane: If your Honor please——

The Court: Will you pause for just a moment? You may make your statement, now, Mr. Lane. [47]

Mr. Lane: If your Honor please, Exhibit No. 8 is a copy of a letter from Mr. Ahearn that he wrote to the Navy under date of February 19, 1952, relative to the delivery dates and the use of latex cable and the Exhibit numbered 9 is the original letter from the Navy to Mr. Ahearn dated March 7, 1952.

(Letter to Mr. Ahearn marked Plaintiff's Exhibit No. 9 for identification.)

Mr. Lane: I would like to offer both Plaintiff's Exhibits 8 and 9 in evidence. I don't believe counsel has any objection to them. I am offering them now as a matter of sequence. I think it is helpful to the Court to keep the different dates in sequence.

The Court: Any objection?

Mr. Hoof: Oh, I have no objection, your Honor.

The Court: Each of them is now admitted. [48]

* * *

The Court: Exhibit 8 is said to relate to delivery dates and use of latex. What, Mr. Upson, if you know, does Exhibit 9 relate to, the same subject or a different one?

(Testimony of Merritt Upson.)

Mr. Hoof: Exhibit 8, your Honor, does not refer to latex at all.

The Court: Exhibit 8 does not? Was any such statement about delivery dates and use of latex made by Mr. Lane concerning either of these two exhibits?

Mr. Lane: I have never seen Exhibit 8 before, your Honor, and I did not read it. I merely noticed that it was a letter from Mr. Ahearn to the Navy. The one Exhibit 9, which replies to that letter, does refer to latex. [49]

* * *

Q. (By Mr. Lane): Mr. Upson, will you state to the Court, if you know, what Exhibit 10 is?

A. Exhibit 10 is a write-up on March 10, 1952, of the latex insulation wire. [53]

Q. And who wrote it up? A. I did.

Q. And will you tell the Court the circumstances and when it was written up and why it was written up?

A. On March 10, I made a trip to Bremerton with Mr. Novich and we called on Mr. Ahearn. At that time I had the prices on the latex, and we discussed it with Mr. Ahearn and Mr. Rockwell came in at that time, and during the discussion, why, the time element came up where the paper covered would not be delivered for almost a year later than this could be delivered, and Mr. Rockwell said: "Well, we will have to finish the job. We should get the wire." Well, we discussed a

(Testimony of Merritt Upson.)

little further, and at that time, about that time, we left and went across the street.

The Court: Who is Mr. Rockwell? I have not heard his name before. Was he a Westinghouse employee or an Ahearn employee or was he an employee of either Westinghouse or Ahearn?

The Witness: Your Honor, he was Mr. Ahearn's foreman at that time. [54]

* * *

A. (Continuing): Well, after that, we went back to Mr. Ahearn's store, and the subject of this wire came up again, and I asked Mr. Ahearn—I said: "What are we going to do on this?" And he said: "Well, we had better go ahead and get it." So late this afternoon or that day, March 10, 1952, I wrote this particular order, wrote it up, with the carbon copy which I personally mailed myself.

Q. Mailed it to him?

A. To Mr. Ahearn, Bremerton, Washington.

Q. When did you mail it?

A. Either the night of the 10th or the morning of the 11th.

Q. Now, I did not understand from your testimony who said: "We had better get the wire."

A. Mr. Rockwell made that statement first, and during the discussion he said: "I don't see how we can wait that long."

The Court: And say again, if you have already said so, for whom was he working or acting at that time?

(Testimony of Merritt Upson.)

The Witness: He was the foreman on this particular job for Mr. Ahearn at that time.

Q. (By Mr. Lane): Now, that was the meeting before you went out [56] and had coffee, as I understand it?

A. That is right, sir.

Q. And then what was said between you and Mr. Ahearn after you came back to Mr. Ahearn's place of business afterwards?

A. We discussed the price of this wire and I asked Mr. Ahearn what are we going to do. We have got to do something on this on account of the penalty clause.

Q. Well, who said that?

A. I did, and so Mr. Ahearn said: "Well, let's get the wire then."

Q. He said to you: "Let's get the wire" and you interpreted it as an order to order the wire?

A. That is right, sir.

Q. And was there discussion at that time as to the difference in the cost of latex cable and paper-wrapped wire?

A. That is right, sir.

Q. And approximately what was the difference in price?

A. Oh, roughly, around \$5,000.

Q. And who was present at that time?

A. Mr. Novich, Mr. Rockwell, Mr. Ahearn.

Q. Now, I am speaking about the last time, Mr. Upson. Who was present when you went back? [57]

A. Mr. Novich, Mr. Ahearn, and myself. [58]

(Testimony of Merritt Upson.)

The Court: All are present as before, and you may resume the interrogation of the witness.

Q. (By Mr. Lane): Mr. Upson, as I recall, we were talking about your meeting on March 10 in Bremerton at Mr. Ahearn's office, when we recessed at noon, is that correct? A. Yes, sir.

Q. At that meeting was there any discussion as to a change in the quantities of wire ordered?

A. Yes, there was.

Q. And what was the discussion or what was the change?

A. I think, as I recall, that due to some changes made on the job that would affect the lengths of the runs of this wire—I believe there were some telephone boxes [59] that were omitted from the job.

Q. Well, now, will you look at Exhibits 10 and 11 and tell me whether the quantities in that order are different than the quantities in the original order that was put in by Mr. Ahearn for telephone cable?

A. On my original write-up these quantities were given to me by Mr. Ahearn on March 10, 1952, and on our order on the factory which is taken from my write-up the quantities show the same as ordered. However, in manufacture sometimes they don't come out exactly even when they run this wire or manufacture it, so there may be an overage.

Q. Will you explain that to the Court? In speaking of 6 pair wire, how much of that was ordered? A. 6 pair wire? 1800 feet.

(Testimony of Merritt Upson.)

Q. And how much was delivered?

A. 1850 feet.

Q. And why is that difference?

A. As I explained, this wire is made up special, and sometimes as it is manufactured, you can't exactly come right out on 1800 feet. There will be a little overage on it, on the reel which they will ship.

Q. Is there generally an overage or an underage?
A. Well, usually an overage.

Q. Is that the same amount that was ordered of [60] paper-wrapped wire, do you recall, or do you want to look back at the original order?

A. These quantities, I believe, differed from the quantities of the paper wrapped.

Q. In all of the three different types of wire there?
A. Yes, sir.

Q. And where did you get the figures for the change in the quantities?

A. Those were given to me by Mr. Ahearn on March 10, 1952.

Q. Now, was there a discussion then as to delivery dates between latex and paper-wrapped wire on that date?
A. Yes, sir.

Q. And what was the discussion? Could there have been any change in the delivery dates of the different types of wire?

A. No. The delivery dates remained the same. The paper and lead was still third quarter '53 and the latex was third quarter '52.

Q. And was there a discussion as to the penalty

(Testimony of Merritt Upson.)

clause in Mr. Ahearn's contract with the Government? A. Yes, sir.

Q. Do you recall what the penalty clause [61] was?

A. To the best of my knowledge, I believe it was \$40 a day.

Q. And then as I understand, you made out Exhibit No. 10, the order, in pencil, did you?

A. Yes, sir.

Q. And how many copies were made of that order? A. I made one copy.

Q. The original and one copy, you mean?

A. The original and one copy.

Q. And what was done with the original?

A. The original was turned into our office.

Q. And what was done with the copy?

A. The copy was mailed to Mr. Ahearn.

Q. And that is a copy of Exhibit 10?

A. Yes, that is right.

Q. And who mailed it?

A. I mailed it myself.

Q. Now, in connection with the Ahearn job, were copies of all orders that were written in long-hand mailed to him?

A. All of the orders that I wrote myself, I made a copy which I mailed.

Q. And why did you do that?

A. Well, merely to let him know just what had been written up and ordered. [62]

Q. And then, after that order is written out in

(Testimony of Merritt Upson.)

longhand, you say that the original goes to the office and then what happens to that copy?

A. That copy goes to the order editor. They check it and code it and then it goes to the purchasing department and they will issue a purchase order against this write-up, my write-up.

Q. Well, they will enter a purchase order to whom concerning what?

A. Well, in this particular case, the order would be entered on Electric Agencies who are representatives of United States Rubber Company.

Q. Covering what? A. Latex wire. [63]

* * *

Q. Then, as I understand, the latex cable would be ordered by your purchasing department, did you say?

* * *

Q. And do you know whether or not the latex cable was so ordered?

A. Yes, I knew it was ordered.

Q. Do you know approximately when the cable arrived at Bremerton?

A. The exact date I do not know but it was some time around the first of January, I believe, in 1953.

Q. And it was delivered to Mr. Ahearn at that time? A. Yes, sir.

Q. It was shipped direct to him, was it? [64]

A. Yes, sir.

The Court: Was the latex cable actually delivered on the job?

(Testimony of Merritt Upson.)

The Witness: Yes, sir.

The Court: Was anything done one way or another to accept or reject it. If so, what happened?

The Witness: If I remember correctly, I think the cable was there for about two weeks, I think, before anything was done.

The Court: You mean it was on the job for about two weeks?

The Witness: Yes, sir.

The Court: What happened, if anything did happen, then?

Q. (By Mr. Lane): Will you tell the Court what happened then, Mr. Upson?

A. I believe that the material was on the job and I believe that the Navy notified Mr. Ahearn that they would have to pull the wire and finish the job or there would be a penalty, and I believe that, at that time, they started pulling the wire.

The Court: How is that done?

The Witness: Actually I wasn't at the pulling of [65] the wire, but they usually jack these reels up so they will turn freely and take the wire off and pull it through these different conduits to a connection box, you can call it, or possibly they may make a splice.

Q. (By Mr. Lane): You saw the wire on the job, did you, Mr. Upson? A. No, sir.

Q. You were over at Bremerton between the time the wire arrived and the time it was pulled, weren't you? A. Yes, sir.

(Testimony of Merritt Upson.)

Q. And what was the occasion of your going over there?

A. I think that, as I recollect, Mr. Flechsig gave me a note that he had a phone call from, I believe it was from, Mr. Rockwell asking why the difference in the price of the wire, and Mr. Flechsig asked me if I would go over there and see what it was all about and report to him.

Q. And who did you talk with over there that day?

A. Mr. Rockwell.

Q. And Mr. Flechsig went over with you?

A. No, sir.

Q. You went over alone? [66]

A. Yes, sir.

Q. Had Mr. Rockwell up to that time known that latex wire had been ordered instead of the paper-covered wire?

A. To the best of my knowledge, he didn't.

The Court: Did not?

The Witness: Did not. I am sorry.

The Court: Whose employee was he?

The Witness: Mr. Ahearn's.

The Court: That is Mr. Rockwell?

The Witness: Mr. Rockwell, yes, sir.

Mr. Lane: He was the foreman on the job, your Honor.

The Court: I thought you said that he had had some talk before the latex was ordered about the need of it or whether it was needed, etc.

The Witness: That is right, sir.

The Court: He was not then told of the increased cost?

(Testimony of Merritt Upson.)

The Witness: He was not there when I was told to order the latex. [67]

* * *

The Court: I do not understand you. You do not talk like a man that I would expect to have been on a sales end of this order and who had anything to say about the price. You claim to have had something to say about it and you do not seem to—You act as if there is something terribly mysterious about it or there is something troubling you. Is there anything you are not able to bring out here, that the questions do not call for?

The Witness: I was trying to recall our conversation. That was several years ago.

The Court: Well, that is about two years [70] ago?

The Witness: Yes.

The Court: How old are you?

The Witness: 52.

The Court: Have you ever been troubled with any memory troubles or anything of that kind?

The Witness: No, sir.

The Court: Proceed. Pretty soon the Court will suggest recalling the witness and have somebody else take the stand who knows anything about the case.

Q. (By Mr. Lane): Mr. Upson, as I understand, there was a discussion that day as to the price of this wire. That was the first day that Mr. Rockwell knew that the different cable had been

(Testimony of Merritt Upson.)

ordered, is that right? Is that what you testified to?

A. Yes, sir, to the best of my knowledge.

Q. And he was at that time discussing the price with you and you were probably discussing it with him. Will you tell the Court just what each said to the other.

A. Well, he said he had not authorized the ordering of the wire, and I told him that Mr. Ahearn had, and that we would do what we could. We would try to get to the bottom of the thing and see what could be done about it, if there was any error or anything. [71]

Q. Did he ask you to cut the price of the wire, change it? A. No, he did not.

Q. Did you agree to do it? A. No, sir.

Q. Had the Ahearn Electric Company at that time received approval from the Government to——

A. Yes, sir.

Q. (Continuing): ——to use this latex wire?

A. Yes, sir.

Q. You had knowledge of that?

A. Yes, sir.

* * *

Cross-Examination

By Mr. Hoof:

Q. Mr. Upson, I am going to attempt to summarize what I understand your testimony was in the last moment or so in connection with your trip to Bremerton in the early part of January, 1953. You stated that you went to see Mr. Rockwell, is

(Testimony of Merritt Upson.)

that correct? A. Yes, sir.

Q. And you stated, at his office. Now, is [72] there any distinction between Mr. Rockwell's office and that of the Ahearn Electric Company?

A. Yes, sir. During that time Mr. Ahearn had sold his business on Sixth Street.

* * *

Q. But if you contended that the agreement or anything in connection with the order had been done by Mr. Ahearn, why did you then go to see Mr. Rockwell at Mr. Rockwell's place of business instead of seeing Mr. Ahearn?

A. Well, Mr. Rockwell was foreman on the job, and he was the one that made the inquiry or the request.

Q. Did you not know that Mr. Rockwell's foremanship had been terminated some time prior to that? A. No, sir.

Q. Mr. Rockwell had his own business in Bremerton at that time, didn't he, in January?

A. That is right.

Q. Rockwell Electric?

A. I believe that is what he called it, yes.

Q. Now, earlier in your testimony this morning with reference to the discussion that was had, that you testified to occurring on the 10th day of March, 1952 [73] at the office of the Ahearn Electric Company on Sixth Avenue in Bremerton, you testified, as I understand your testimony, that present at the meeting were yourself, Mr. Ahearn, Mr. Novich of your company in the lighting department, and

(Testimony of Merritt Upson.)

you said, I believe, a man whose name was Blackwell. A. Blackman.

Q. Now, Mr. Novich, or rather Mr. Upson—pardon me, sir—you were present, were you not, on June 15, 1954, when the deposition of Mr. Rockwell was taken and the deposition of Mr. Blackman was taken? A. Yes, sir. [74]

* * *

Q. Why did you hesitate on your direct examination as to who was present at the meeting and you said: “I believe possibly a man—his name was Blackman”—that was about the way you answered the question.

A. Well, for this reason, a Mr. Blackman working there was in and out and actually he would not be a party to this discussion. It would be between Mr. Ahearn and Mr. Rockwell and I didn’t pay too much attention over there to just who was around other than just the four of us. [75]

* * *

Q. Mr. Upson, now, as I understand your testimony this morning, at the meeting at which Mr. Rockwell was present, that is, the four persons I have now mentioned, Mr. Rockwell said—and I am quoting you now as to what Mr. Rockwell said, in your testimony this morning, at the March 10, 1952, meeting—“He said: ‘Let’s get the wire.’” Do you remember having so testified? A. Yes, sir.

Q. And then, do you recall your testimony with reference to your meeting at Mr. Rockwell’s place

(Testimony of Merritt Upson.)

of business in the early part of January, 1953, which you have just testified to, in which a fair summary of your testimony would be that Mr. Rockwell had not authorized the wire and that he had not ordered the wire? A. That is right.

Q. That is a fair summary of your testimony this afternoon? A. Yes.

Q. Now, which is correct, sir?

A. Is the question addressed to me?

Q. Yes. Is your testimony this morning correct or is your testimony this afternoon correct?

A. Mr. Rockwell did not order the wire. During this conversation he said: "Well, we had better get it" or words to that effect—"We have got to finish the job"—He [77] had no authority to order it at that time, I understand.

Q. Well, did you not say, sir, this morning that in the meeting of the four of you, Mr. Ahearn, Mr. Rockwell, yourself and Mr. Novich, on March 10, 1952, that Mr. Rockwell said: "We would have to do something about it. We'd better get the wire."

A. That is just about the words he used, but I wouldn't take that as an order. [78]

* * *

Q. Mr. Upson, you have been handed what has been admitted in evidence as Exhibit No. 3, which Mr. Upson, is the quotation from Westinghouse to the Ahearn Electric Company. I am correct in that?

A. You say which—

Q. I say, which exhibit is the quotation dated

(Testimony of Merritt Upson.)

January 31, 1952, from the Westinghouse Company to Ahearn Electric Company?

A. Yes. This is the quotation.

Q. Now, sir, did you or did you not deliver that quotation personally? A. I did not. [83]

* * *

Q. Did you discuss with him on or before February 1, of 1952, the matter of the supply of latex or paper-covered wire? A. No, sir.

Q. Did you, on or before February 1, 1952, discuss with Mr. Ahearn anything with relation to expediting delivery of paper-covered wire that is shown in the quote, Exhibit 3?

A. No, sir.

* * *

Q. If you will refer, Mr. Upson, to the, I believe, the [83] third sheet of Exhibit No. 3, referring to the references to the paper-covered wire, you will note there the language: "Orders on Telephone Cable should be placed direct with Graybar Electric Company, Seattle." A. That is right, sir.

Q. And you will also note that it says: "Shipments—Telephone Cable—Third Quarter 1953."

A. Yes, sir.

Q. Now, on or about the 5th day of February, of 1952, you took an order from Mr. Ahearn for certain supplies for this work, and I am now asking it to be handed to you. That which has been marked as Exhibit No. 4,—correction—Exhibit No. 5.

A. I have Exhibit No. 5.

(Testimony of Merritt Upson.)

Q. Now, that is the order that you took on that day, is it not? I believe it is dated February 5.

A. February 5, that is right.

Q. That order was taken in Bremerton?

A. That is right, sir.

Q. And that order calls for paper covered wire?

A. That is right.

Q. That is for the performance of this contract, the Navy Yard contract? The order, Mr. Upson, is an order directly to the Westinghouse Company, is it not?

A. That is right. [85]

Q. As distinguished from being an order directly placed with Graybar?

A. That is right.

Q. That is correct?

A. That is right.

* * *

Q. I asked you one question only—whether or not you did not request the order be placed for the wire to your company rather than having it separately placed to Graybar?

A. That is right, sir.

Q. You did ask that of Mr. Ahearn?

A. I did.

Q. Mr. Ahearn gave you the order, did he [86] not?

A. Yes, sir.

Q. Now, at the same time that you asked him to place the order directly with you, I will ask you, sir, whether or not you did not represent to Mr. Ahearn

(Testimony of Merritt Upson.)

on that date that if the wire were ordered directly from you, the paper-covered wire, as distinguished from ordering it from Graybar, that you would be able to obtain the paper-covered wire in ample time for Mr. Ahearn to complete the contract, that you had ways and means of getting the wire, that it was obtainable?

A. I had ways of getting the wire, but the completion date or the delivery date would remain the same.

Q. Well, now, as a matter of fact, you were aware, were you not, when you talked to Mr. Ahearn on the 5th of February, what the completion date of the contract was?

A. To the best of my knowledge, no, not at that time.

Q. You knew, however, did you not, that the completion date was in the fall of 1952?

A. That is right.

Q. You knew it was in the fall of '52?

A. That is right.

Q. And I again ask you whether or not you did not represent to Mr. Ahearn that if the order for the paper-covered wire were placed with your company, you would [87] obtain it, because you did have sources, you would obtain the paper-covered wire in ample time to complete the contract?

A. No, sir.

Q. No such suggestion was made by you?

A. No, sir.

Q. Now, was any such suggestion as that made

(Testimony of Merritt Upson.)

by you prior to the time that Mr. Ahearn put in his bid? A. No, sir.

Q. I wish to refer, sir, to your pre-trial deposition taken on April 21, 1954.

Mr. Hoof: Do you have a copy, Mr. Clerk?

The Clerk: Yes.

(Hands it to the Court.)

The Court: What page is it?

Mr. Hoof: I am going to refer now, your Honor, to page No. 8.

Q. (By Mr. Hoof): On Line 5 of your deposition, I asked you a question, and the question refers to the quotation of January 31, which is Exhibit No. 3. This is the question:

“Q. I will ask you, Mr. Upson, whether or not on the 31st of January, 1952, you did not take this quotation to Bremerton and meet with Mr. [88] Ahearn?

“A. I can’t say whether it was taken over by myself or mailed.

“Q. Would you deny that you took it over?

“A. I wouldn’t deny anything.

“Q. What?

“A. I wouldn’t deny it. I say I can’t recall whether it was mailed. Normally, they go out in the mail; sometimes not.”

Was that your testimony, sir?

A. It was at that time, sir.

Q. I am now referring to page 17 of your dep-

(Testimony of Merritt Upson.)

osition, pre-trial deposition, and the particular testimony here resolves itself with reference to the meeting of March 10, of 1952, at the office of the Ahearn Electric Company.

The Court: What page?

Mr. Hoof: On Page 17, your Honor, Line 20, and I am going to have to take a question here in order to follow up with what I wish to arrive at, beginning on the next page.

Q. (By Mr. Hoof): I am now reading from your deposition.

“Q. Will you tell me just exactly, in your own words, what you obtained and what you did about it”? [89]

Now, this has reference to the quote of United States Rubber Company.

“A. I received this quotation on delivery from the United States Rubber Company on latex. At the time I made a trip to Bremerton, which I usually did anyway, two or three times a week. I discussed the prices with Mr. Ahearn and Mr. Rockwell at that time.

“Q. Would you tell me where the discussion took place? A. 826 Sixth.

“Q. Go ahead? [90]

* * *

“A. These prices were discussed, at that time, and the delivery was third quarter of '53. Mr. Rockwell made the statement, he says, ‘My golly! We

(Testimony of Merritt Upson.)

can't wait until '53 for the other. We had better go ahead and get this wire.' And I wrote the order.

"Q. Was Mr. Ahearn present?

"A. Yes, sir.

"Q. Who is Mr. Novich?

"A. He is one of our lighting specialists."

Now, in your answer on page 18 of your pre-trial deposition, your statement is that you relied upon Mr. Rockwell's representation with Mr. Ahearn being present. You relied upon an order from Mr. Rockwell. A. No, sir

Q. Now, were the questions that I have now read to you and the answers that I have now read to you, the questions and answers given at your pre-trial examination, were they not?

A. Yes, they were given.

Q. Now, in your pre-trial examination, Mr. Upson, did you, sir, at that time ever say that two meetings had occurred?

A. I don't believe I did, sir. [91]

* * *

Q. Was Mrs. Ahearn present at the March 10 meeting or at any of the asserted March 10 meetings?

A. To the best of my recollection, she wasn't there on March 10.

* * *

Q. She was not present? I am going to ask [92] one question in a little different way than I have

(Testimony of Merritt Upson.)

previously asked it. Now, to start with, your company, according to the testimony of Mr. Schindler, was furnished with specifications for the work that was to be accomplished at the Navy Yard as well as certain blueprints for the purpose of taking materials off? A. From what source?

Q. Well, Navy Yard specifications and blueprints for this particular work. As I understood his testimony, he took the materials off those.

A. That is right. He does, sir.

Q. Now, did you see those specifications yourself prior to February 5, of 1952?

A. No, sir.

Q. Why were you willing, Mr. Upson, to accept from the Ahearn Electric Company an order, which is in evidence as Exhibit No. 5, written up by yourself, for paper-covered wire, Telephone Cable, in deviation from the quotation as to where it should be ordered if you could not supply that wire by the fall of '52 when the contract had to be completed?

A. Well, the answer to that would be this way: that Graybar themselves do not deliver the wire any sooner than we could. We have to purchase from them, and in order to keep this order all in one, like a package, what [93] we call a package deal, I would accept it that way as a courtesy.

Q. Now, in this Exhibit No. 5, which is your order where you accepted the order for the paper-covered wire, you placed no limitation, did you, as to the time for delivery?

(Testimony of Merritt Upson.)

A. In my actual order, my writing?

Q. Yes, sir.

A. I was going by the quote, the quotation.

Q. You placed no limitation for time of delivery. In other words, you did not say that we can't deliver this. The order is placed with us. Now we can't deliver this until '53. You didn't say that in the order, did you?

A. I don't believe it is on my order. It is on our quotation.

Q. But your quotation, sir, was not followed.

A. Pardon?

Q. Your quotation, sir, was not followed in that you accepted the order rather than having Mr. Ahearn order directly from Graybar. You testified—you deviated from the quotation, sir, did you not?

A. Yes, that is right.

Mr. Hoof: No further questions. [94]

* * *

Voir Dire Examination

By Mr. Hoof: [104]

* * *

Q. And did I understand it, your testimony is that, with reference to Exhibit 10, you personally mailed a copy of that to Ahearn Electric?

A. Yes, sir.

Q. That is a copy of No. 10?

A. That is right, sir.

(Testimony of Merritt Upson.)

Mr. Hoof: I will have no objection to Exhibit No. 10.

The Court: That is admitted. [106]

(Plaintiff's Exhibit No. 10 is received in evidence.)

Mr. Hoof: No. 11, I will still object to that, your Honor, as being an order to the Electrical Agencies and no showing, except automatically, that a copy would go to Ahearn Electric.

The Court: The Court thinks that since that is more in the nature of an office record that somebody else has been keeping and using, such witness should be produced to account for its history and its present condition in respect to notations noted thereon and other items of divergence of identity from the identity of Plaintiff's Exhibit 10. The Court is unable to take the view that it is admissible at this time and does sustain the objection as of this time with leave to adduce additional proof. [107]

* * *

A. J. FLECHSIG

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lane: [108]

* * *

Q. Mr. Flechsig, state, if you know, when the latex cable was ordered by Westinghouse from whoever they ordered it from.

A. The order for it was typed on March 11, 1952, and it was either mailed to Electric Agencies, who are the agent for United States Rubber in this area, on that evening or the next morning. U. S. Rubber acknowledged receipt of it or acknowledged in their letter of November 21, 1952, that the factory accepted the order on March 24, 1952.

The Clerk: Plaintiff's Exhibit No. 15.

(Invoice from U. S. Rubber marked Plaintiff's Exhibit No. 15 for identification.)

Q. (By Mr. Lane): Mr. Flechsig, there has been handed you Plaintiff's Exhibit 15, will you state to the Court what it is, please?

A. That is invoice from United States Rubber Company to Westinghouse Supply. [124]

Q. And what is the date of it, please?

A. It is dated December 24, 1952.

Q. And does it show on it the date that the latex was shipped?

A. It shows shipment as of 12-20-52.

(Testimony of A. J. Flechsig.)

Q. To whom?

A. To Ahearn Electric Company, Quarters Area, Puget Sound Naval Shipyard, Bremerton, Washington.

Q. Do you know the date that the cable arrived at Bremerton?

A. Mr. Lane, I do not know that exactly.

Q. The approximate date?

A. I do know that from a phone call that I made that Black Ball Freight Lines signed for it on January 5, 1953. Signed for by a Mr. A. G. Morris.

Q. Would it be delivered a short time thereafter?

A. It should be delivered the next day. Whether that is true, I don't know. I have asked for a certified copy of the delivery bill of lading which I haven't got yet.

The Clerk: Plaintiff's Exhibit No. 16.

(Invoice for latex marked Plaintiff's Exhibit No. 16 for identification.) [125]

Mr. Lane: I will ask that Plaintiff's Exhibit No. 15 be admitted in evidence, your Honor.

The Court: Any objection?

Mr. Hoof: No, your Honor.

The Court: Admitted.

(Plaintiff's Exhibit No. 15 is received in evidence.)

Mr. Lane: Do you have a copy of the invoice

(Testimony of A. J. Flechsig.)

covering this cable, Mr. Hoof, that was requested of you?

Mr. Hoof: Here it is, Mr. Lane.

Mr. Lane: I will substitute this then, your Honor, for that.

The Court: For No. 16?

Mr. Lane: For 16, yes.

The Court: The Clerk will kindly withdraw what was previously marked 16 and delete the Clerk's marks therefrom and return it to counsel who produced it and will place those same marks on what is now the substituted copy, and the substitution of what now is offered is approved and ordered by the Court. [126]

(At this time the exhibit previously marked Plaintiff's Exhibit No. 16 for identification is withdrawn and a substituted copy of the invoice for latex is marked Plaintiff's Exhibit No. 16 for identification.)

Q. (By Mr. Lane): Mr. Flechsig, there is handed you Plaintiff's Exhibit 16. Will you state what that is, please, if you know?

A. That is our invoice covering a shipment of latex to Ahearn Electric.

Q. And what is the date of that, please?

A. 12/30/52.

Q. And would that be the date approximately when it was mailed?

A. It was either mailed that day or the day after.

Q. Now, will you check the prices on that and

(Testimony of A. J. Flechsig.)

see if they correspond with the prices on Exhibit No. 10, please?

A. The prices per thousand—just a minute—the prices per thousand check. The footage does not exactly check, nor does Exhibit No. 10 show the copper adders. [127]

Q. Now, the prices on the three cables check, though? A. That is right.

Q. And why is the footage a little different?

A. Well, in the case of the 6 pair, Exhibit 10 shows 1800 feet. Exhibit 16 shows 1850 feet. Manufacturing tolerances normally by most wire manufacturers permit a 5% plus or minus tolerance quantity.

Q. And what about the other—

A. In the case of the 26 pair, which is Item 2, the quantity as shipped and billed was 1945 feet, and on Exhibit 10 it shows it as ordered for 1900 feet. The third item for the 51 pair, the invoice on Exhibit 16 shows as shipped and billed 1278 feet as against 1250 feet ordered.

The Court: Does the paper have a name?

The Witness: Which one is that, your Honor?

The Court: Plaintiff's Exhibit No. 16.

The Witness: No. 16 is Westinghouse Electric Supply Company invoice.

The Court: Does No. 15 have a name? If so, will you state what it is?

The Witness: No. 15 is United States Rubber Company's invoice to Westinghouse Electric Supply. [128]

(Testimony of A. J. Flechsig.)

Q. (By Mr. Lane): And 16 is the invoice from Westinghouse to Ahearn, is that right?

A. That is right, sir. Both of them are identified by Contract NOY 28688.

Mr. Lane: I will offer that in evidence.

Mr. Hoof: No objection.

The Court: Plaintiff's Exhibit No. 16 is now received in evidence.

(Plaintiff's Exhibit No. 16 received in evidence.)

Q. (By Mr. Lane): Now, if you will look at Plaintiff's Exhibit No. 16 and if you will look at Plaintiff's Exhibit 13 and Plaintiff's Exhibit 11. will you please explain to the Court, if you know, why the name of the purchaser or the customer was changed and why the address was changed?

A. I have a part of those records with me. The question you are asking is why on Exhibit 11 and Exhibit 13 the "Electric Company" was x'd out and the word "John" was placed ahead of Ahearn?

Q. Yes. A. This will take a minute.

(Looking through documents.) [129]

On October 7, 1952, our Tacoma office wrote our credit department advising that their salesman calling on Bremerton area at that date was advised of a change of ownership for the Ahearn Electric Company, Bremerton. The new owners are a Mr. Ambrose Costello and a Mr. Earl Ferry. We were advised that they will operate under the name of

(Testimony of A. J. Flechsig.)

Ahearn Electric. This was verified by a Dun and Bradstreet report dated October 8, 1952 which reads—— [130]

* * *

Mr. Lane: If your Honor please, I have here the original ledger sheet of this account which counsel has consented not be put in evidence but I have an exact copy of it.

The Court: You may have that copy marked.

The Clerk: It will be Plaintiff's Exhibit No. 17.

(Copy of ledger sheet marked Plaintiff's Exhibit No. 17 for identification.)

Q. (By Mr. Lane): Mr. Flechsig, I hand you what has been marked [131] Plaintiff's Exhibit No. 17 and ask you to state what that is, please.

A. This, Mr. Lane, is an exact copy of our ledger sheet on the job identified as Job Account, Puget Sound Naval Shipyard, NOY 28,688.

Q. And are you familiar with that, Mr. Flechsig? A. I am, sir.

Mr. Lane: I will, your Honor, ask that this be admitted in evidence.

The Court: It is admitted.

(Plaintiff's Exhibit No. 17 received in evidence.)

Q. (By Mr. Lane): I will ask you to state whether or not, if you know, whether that ledger account shows all of the charges for goods that were

(Testimony of A. J. Flechsig.)

delivered to Mr. Ahearn and all credits, whether by cash or otherwise.

A. To the best of my knowledge, that is right.

The Court: May I ask as of what date it does that?

The Witness: The final credit on it, which was a payment, was on December 14, 1953.

The Court: You may inquire. [132]

Q. (By Mr. Lane): Now, would that show all of the charges and credits from the time the job account opened in February '52 down to the present time?

A. That is right. The first charge was on February 26, 1952.

Q. And what is the balance now due on this account to Westinghouse from Mr. Ahearn?

A. \$5,469.51.

Q. Mr. Flechsig, as I understand the testimony, the latex cable was not manufactured by Westinghouse but was purchased by Westinghouse from the United States Rubber, or one of its subsidiaries?

A. That is correct. The order was entered on Electric Agencies who are the representatives of U. S. Rubber in this area. We were invoiced directly by U. S. Rubber.

Mr. Lane: Now, if you would hand Mr. Flechsig Exhibits 15 and 16, please?

(Plaintiff's Exhibits 15 and 16 are handed to the witness.)

The Court: Do you have the date, Mr. Flechsig,

(Testimony of A. J. Flechsig.)

and, if so, will you now state it, when the order was put in by your company to United States Rubber for the latex you just mentioned? [133]

The Witness: Your Honor, I will have to do that from memory. There is an exhibit——

The Court: Would you like to refer to it or ask counsel's assistance in so doing?

The Witness: That is our direct order copy. This is a copy of it. The original I would like to see. Oh, here it is. Excuse me. Our order on Electric Agencies was dated March 11, 1952.

The Court: I ask you if you have just now referred, before making your last answer, to Plaintiff's Exhibit No. 10?

The Witness: Well, I was, your Honor, referring to No. 11.

The Court: Will you look at Plaintiff's Exhibit No. 10?

The Witness: I have Exhibit No. 10 here, your Honor. Exhibit No. 10 was dated March 10.

The Court: What kind of an instrument is it?

The Witness: Do you mean, your Honor——

The Court: No. 10.

The Witness: That is our salesman's write-up, longhand write-up, of the order that he turns into the office from which the purchase order is written.

The Court: That completes the Court's inquiry. You may resume the interrogation. [134]

Q. (By Mr. Lane): Then if you would just continue on, Mr. Flechsig, maybe we can clear this up.

(Testimony of A. J. Flechsig.)

I refer now to Exhibit No. 11, and will you tell the Court what that is and how it is made, please?

The Court: It is rejected and, of course, do not state the contents. The question is a proper one but confine your answer to it directly. Read the question.

(The last question is read by the reporter.)

The Witness: That, your Honor, is the original of our direct shipment order. By that I mean, as I testified yesterday, it is the original piece of paper on which the typist types the order. If I may refer to Exhibit 12——

The Court: You may do that. That is the direct shipment form?

The Witness: That is right.

The Court: It is No. 3050 in six sheets. It is an unfilled out form as to all six sheets.

The Witness: That is right. Now, the second copy or the first carbon copy or the second piece of paper in the form constitutes the purchase order on our supplier of whatever it may be, whatever the material may be. [135]

The Court: Very well. You may proceed.

Q. (By Mr. Lane): And Exhibit No. 11 is made up from what, Mr. Flechsig?

A. Exhibit No. 11 is made up from our salesman's order write-up which is identified here as Plaintiff's Exhibit No. 10.

Q. And then what happens, if you know, to the six copies of which Exhibit 11 is a part?

(Testimony of A. J. Flechsig.)

The Court: You mean in the ordinary course of his business?

Q. (Continued): In the ordinary course of your business procedure at your office, Mr. Flechsig.

A. All right. I would like to——

The Court: Can you not answer that question directly?

A. (Continued): ——again refer to Plaintiff's Exhibit 12, if I may. Then I can follow the procedure and explain how it goes.

(Witness is handed Plaintiff's Exhibit 12.)

The first sheet is the original typed copy and it is our order service copy. It remains in the files available to all of us office personnel.

Mr. Hoof: May it please the Court, I believe that Mr. Flechsig fully went through the exhibit [136] yesterday.

The Court: I feel the same way about it and I doubt if Mr. Lane's question to him contemplated doing of the same work or covering the same ground. I think he wanted the witness to speak about this specific thing, did you not?

Mr. Lane: That is it. I thought possibly the Court did not understand the procedure.

The Court: I am not concerned about the procedure, I am concerned about what happened in this case and what connection, if any, did this defendant have with this exhibit. That is the thing that is involved.

Mr. Lane: All he can do is testify, your Honor,

(Testimony of A. J. Flechsig.)

what happens in the normal course of their office procedure.

The Court: Well, that, of course, is interesting if it is connected up with what actually occurred in a given case, but the mere fact that an office has a practice does not alone prove admissibility. There ought to be some connection between the exhibit and the defendant. Proceed.

A. I think, Mr. Lane, then, I will answer your question this way: That in our standard procedure there is a direct shipment acknowledgment copy, which as is [137] evidenced by Exhibit No. 11, has typed thereon the description of the material ordered, the amount ordered, and the price thereof, and all of that data shows on the acknowledgment copy.

Q. All right. Now, Mr. Flechsig, I will ask you to refer to Exhibit No. 16.

A. I have it here.

Q. And I ask you to state whether or not, if you know, the information on Exhibit No. 16, which is the invoice from your company to Mr. Ahearn, the quantities and the amounts and the price of the latex cable is the same or if it is different than that in Exhibit 11, what has been marked as Exhibit 11?

A. The unit price is the same on all three items.

The Court: And you have already explained, have you not, that there was a difference in the amount due to the tolerance in the trade of permitting the supplier to furnish a small quantity more or less than that ordered in order to accommo-

(Testimony of A. J. Flechsig.)

date the quantity proximal production of the article, is that right?

The Witness: That is right, your Honor.

Q. (By Mr. Lane): This type of cable is all run especially, is [138] it, Mr. Flechsig?

A. Under normal conditions, yes. Occasionally they have a small amount in stock. At the time the order was entered, I seriously question whether there was any stocks.

Q. Now, at the time this cable was ordered, what was the condition of the market on telephone cable?

Mr. Hoof: May it please the Court, I wish to object to the question in that the question as to the market on telephone cable seems to me not to be material to the case in any way.

The Court: You mean it is a question of contract?

Mr. Hoof: Yes, your Honor.

The Court: What is the purpose of your question, Mr. Lane?

Mr. Lane: The purpose of my question, your Honor, was to show that at the time this cable was ordered, copper wire was under priority, and there was a scarcity of it, and that it was not always possible to purchase what a certain person wanted. I would like to show at this time that that condition existed, and that possibly that may be the reason why the cable which was originally ordered could not be supplied until a year and a half later, [139]

Mr. Hoof: Mr. Lane, is there any doubt in your mind that the Navy issued a priority for this?

(Testimony of A. J. Flechsig.)

Mr. Lane: I don't know. The cable was not available.

The Court: I think the Court will overrule the objection. That is the ruling. Read the question.

(The last question was read by the reporter.)

A. To the best of my knowledge, and I think I can say that with very definite certainty, there was a critical shortage of not only telephone copper wire but other copper wires as well, and an order could not be entered without a priority, and if my recollection serves me right, going back to what I said a minute ago, manufacturers were not permitted to maintain any amount of stocks. There was some limit placed there on which I cannot answer. [140]

* * *

Cross-Examination

By Mr. Hoof:

Q. I would like to discuss with you momentarily the matter of priorities again, and the original order, as you will recall, called for the paper wire, that is Exhibit No.—Well, there are two Exhibits that show it—They are Plaintiff's Exhibits Nos. 4 and 5, Plaintiff's Exhibit No. 4 being the original purchase order written up at the Ahearn Electric Company and Plaintiff's Exhibit No. 5 being the take-off, as I understand it, by Mr. Upson. I am correct on the exhibit numbers, am I not?

A. You are, Mr. Hoof.

(Testimony of A. J. Flechsig.)

Q. Now, the priority for the third quarter delivery of 1952 was issued based upon the original order, was it not?

A. That was correct, which we couldn't accept on that basis.

Q. Well, I am not asking for your acceptance, whether you did or did not, sir. The priority was issued on the original order.

A. Material, that is right, on the original [144] order.

The Court: Pardon me. That Plaintiff's Exhibit 4 is the one which related to the original order, namely, to the paper-covered cable, is that right?

The Witness: Yes, because it refers to it as Westinghouse Type ENB.

The Court: You may inquire.

Q. (By Mr. Hoof): Now, actually, as you have testified, the amount of copper in a particular gauge of wire is actually the same?

A. That is correct, sir.

Q. Now, there was no change in the priority, was there, extended to you?

A. In the priority extended?

Q. Yes.

A. No, not to my knowledge, there wasn't.

Q. And, as a matter of fact, the latex cable they finally substituted in this matter was of a heavier gauge?

A. That is not true.

Q. It is not?

A. No. They are both 19 gauge. [145]

(Testimony of A. J. Flechsig.)

Q. Now, the debit entry on the accounting sheet, No. 17, corresponds with the exhibit we have just discussed, does it not?

A. With Exhibit 15? [149]

Q. Yes.

A. Except for one detail, Mr. Hoof, and that is Exhibit 15 shows our margin of profit which was 5%, and as such will be 5% less on the price of the cable only than the figures shown on Exhibit 17.

The Court: May I interrupt you, Mr. Hoof?

Mr. Hoof: Yes, your Honor.

The Court: Mr. Flechsig, do you recall whether you ever personally talked with Mr. Ahearn or any one acting for him regarding payment of this account after the latex cable was furnished and with reference to the effect of such latex cable costs on the bill? Did you ever talk to him about paying the bill after that happened?

The Witness: Your Honor, I did after they received our bill.

The Court: What bill? This invoice?

The Witness: No.

Mr. Lane: Plaintiff's Exhibit No. 16.

The Court: Did you talk to Mr. Ahearn personally?

The Witness: I talked to Mr. Ahearn on or about February 14. I was over to his house.

The Court: Will you state what, if anything, was said by you and by him regarding his obligation [150] to pay the account as affected by your furnishing latex instead of paper-covered cable?

(Testimony of A. J. Flechsig.)

The Witness: We had, your Honor, quite a bit of discussion there on that. Naturally, he was——

The Court: Just, if you can, say in substance and effect what the conversation was.

The Witness: He was objecting to the bill.

The Court: Because of the latex item?

The Witness: Because of the increase in price, contending that he never ordered latex.

The Court: Did he ever thereafter make any payment on the account? If so, when and how much?

The Witness: As I recall, our meeting was on February 14. It was on a Saturday.

The Court: You should state the year.

The Witness: It was 1953, and on his total account on May 5 he paid \$5,000 and on July 7 he paid the difference between the balance of \$9,978.33 and \$5,489.72.

The Court: Did he make to you any statement at any time about confining those payments to the order as affected by the paper-covered items or did he make the payments without so notifying you?

The Witness: On July 7, when he paid [151] that difference, he made a deduction by claim in the amount of \$5,489.72, which he did not pay at that time.

The Court: Did he say or do anything which you understood was a waiver by him of his objection to the increased amount of the bill due to your furnishing the latex instead of the paper cable?

(Testimony of A. J. Flechsig.)

The Witness: Verbally he objected.

The Court: All the time?

The Witness: After he received the bill.

The Court: You may inquire.

Q. (By Mr. Hoof): I want to go back of that, Mr. Flechsig, just a moment. The first knowledge that you personally had of this matter was, I believe, in the first week of January of 1953 when a Mr. Rockwell, an employee of the Ahearn Electric Company, called you and stated that the Ahearn Electric Company had just received the invoice for the latex wire and made an objection to it, and then subsequent to that time, having heard that, you then, at a later date, some time presumably as you suggested in February or thereabouts, you went over to look into the situation yourself?

A. Yes, because in the meantime I had sent, I believe, if my recollection serves me right, the following [152] day after Mr. Rockwell called, I sent Merrit Upson over to Bremerton to square this away because at that time I assumed there must be some misunderstanding, that certainly we wouldn't have ordered latex cable without somebody's authority.

Q. Now, would I, in the following statement which I am about to make, make a fair resume of your action personally—Now, I am not speaking of anything other than personally—as to the Ahearn account. While you had somewhat of a general knowledge——

Mr. Lane: Counsel, I would object to this. I think you should let Mr. Flechsig tell what he knows

(Testimony of A. J. Flechsig.)

rather than you put the words in his mouth, so to speak.

Mr. Hoof: This is cross-examination.

The Court: Read the question.

(The last question is read by the reporter.)

The Court: The objection is sustained.

Mr. Lane: If your Honor please, I will waive any objection because I think it will speed it along.

The Court: Very well, then. In view of that attitude, you may finish the question. If you would like it repeated again to pick it up, it will be [153] done.

Mr. Hoof: No, I think I can proceed, your Honor.

Q. (By Mr. Hoof): Now, would this be a fair summary of your personal knowledge of this matter: That, other than in a general way, this account had not particularly been called to your attention, where there were any disputes or anything of that kind, up until the first week of January, 1953; that your immediate information was received by an objection by Mr. Rockwell to the billing and to the receipt of the latex wire; that thereafter, so far as your personal knowledge is concerned, some time in the month of February, 1953, you called at the Ahearn residence; at that time Mr. Ahearn continued to object and thereafter it would be understood that in the payments on the account he paid down to the difference between the cost of the latex

(Testimony of A. J. Flechsig.)

and the paper wire, all other matters as far as this job account having been paid?

A. Mr. Hoof, generally, your statement is correct. I am going to add a few things in there, and that is that, if my memory serves me right, if I recall exactly, Mr. Ahearn came to our office, oh, I would say on about two occasions and at the time, each time he was there, I was still unable to verify that for the reason that my man, Mr. Upson, had not been able—or had not [154] given me—all of the information I needed. Therefore, after I had accumulated all of that information, I went over to Mr. Ahearn at his home where he had moved his business to, also with Mr. Upson, on a Saturday morning, and we discussed it, and at that time I made no concessions.

Q. Nor did Mr. Ahearn?

A. Nor did Mr. Ahearn. That is correct.

Q. Now, one further question please. If Mr. Ahearn did call at your office, it was, of course, after the billing for the latex. That would have been after the early January call from Mr. Rockwell to you?

A. You are talking now only about——

Q. About the latex.

A. About the bill on the latex?

Q. That is correct. [155]

(Testimony of A. J. Flechsig.)

Redirect Examination

By Mr. Lane:

Q. Mr. Flechsig, was paper-wrapped cable, such as ordered in this case originally, available at this time prior to the third quarter of 1953?

A. No, sir.

Q. And that cable is manufactured by whom? Who is it manufactured by? Who was it manufactured by at that time?

A. Paper and lead, you mean, Mr. Lane?

Q. Yes.

A. Western Electric Company.

Q. Does that company have any connection with Westinghouse?

A. No, sir. There was also—General Cable also made paper and lead, but it was not available to us then. It was a different type of paper wiring but it was still paper and lead.

The Court: What month in '53 was that? [156]

The Witness: Third quarter of '53, your Honor.

Mr. Lane: That is all.

Mr. Hoof: I have one question now and only one.

Recross-Examination

By Mr. Hoof:

Q. Would you explain, Mr. Flechsig, if you can, please, why a paper-sheathed wire, that paper being readily available, and with a lead covering, that is paper-wrapped lead covering, would require a longer

(Testimony of A. J. Flechsig.)

time for delivery than a wire requiring a special latex or rubber covering, the rubber being in shortage and lead-sheathed?

A. I can answer that. The telephone company, which Western Electric, as I understand it, is a subsidiary of the Bell Telephone Company or vice versa—I don't know which way it goes legally—but telephone cable and communications was very critical during the war, and, to the best of my knowledge, the bulk of the telephone wire going into various installations throughout the nation were paper and lead, and latex was used only in special cases, being particularly adapted to salt conditions.

The Court: S-a-l-t? [157]

The Witness: Salt, salt atmospheric conditions, and the paper and lead being about—well, I will reverse the thing—latex being about three times, as I recall, as a general average, latex is about three times as expensive as paper and lead, about three times as expensive, so everybody was shooting their orders to paper and lead suppliers, which are limited.

The Court: Tending to exhaust the supply?

The Witness: The manufacturing facilities.

The Court: They overcrowded the manufacturing facilities, leaving a better opportunity to acquire latex than paper-covered?

The Witness: That is right. [158]

* * *

Mr. Lane: If your Honor please, I have [181] obtained a rephotostat of the Exhibit 1 that I offered the other day, which is black on white, which I would now like to offer in evidence as being a certified copy from the General Accounting Office of the contract and of the bond.

The Court: This photostat copy of the material in question referred to in counsel's statement, which now in form meets the requirements of the local rules regarding photostats, will now be marked Plaintiff's Exhibit 18 for identification, and it would be proper for you to submit for inspection by opposing counsel along with this exhibit, the thing of which it is another photostat. It is the other certified copy which does not comply with the Court's ruling and the Court does not accept it.

(Photostat copy contract and bond marked Plaintiff's Exhibit No. 18 for identification.)

(Mr. Hoof examines Plaintiff's Exhibit No. 18 for identification.)

The Court: What would you call that thing, Mr. Lane?

Mr. Lane: It is a certified copy of the contract and the bond. [182]

The Court: It is a photostat of a certified copy——

Mr. Lane: Of the contract and the bond.

Before I offer that in evidence, I will ask if Mr. Ahearn has since yesterday found his copy of the contract?

Mr. Hoof: No, but I will stipulate that that is a copy of the contract.

The Court: Do you have any objection to its being admitted?

Mr. Hoof: I agree to its admission.

The Court: Plaintiff's Exhibit No. 18, containing a copy of both the contract and the bond, is admitted.

(Plaintiff's Exhibit No. 18 received in evidence.) [183]

* * *

Mr. Lane: Now, I will ask counsel if he or Mr. Ahearn have the copy of Mr. Ahearn's letter to the Navy dated January 18, 1953, and the reply from the Navy dated January 26, 1953?

Mr. Hoof: Mr. Lane, here they are. They were on your side of the table.

Mr. Lane: Well, they are part of the exhibits and they came from Mr. Ahearn's file, is that correct?

Mr. Hoof: Yes.

Mr. Lane: Mr. Ahearn now produces them, and I would like to have them marked. The one from Mr. Ahearn to the Navy should be marked first, I believe.

The Court: Let it be marked Plaintiff's Exhibit No. 20.

The Clerk: Do you want them to go together, your Honor?

The Court: Will you determine whether it is all right to have them both one exhibit?

Mr. Lane: Is it all right to have them as one exhibit?

Mr. Hoof: Yes.

The Court: Let them both be attached and let them be marked as one exhibit. [185]

The Clerk: Plaintiff's Exhibit No. 20, your Honor.

(Copy of letter by Mr. Ahearn to Navy and reply marked Plaintiff's Exhibit No. 20 for identification.)

The Court: I wish counsel would now state agreeably if he can, agreeable to opposing counsel, the name which reflects the information contained in this Exhibit 20.

Mr. Lane: These letters——

The Court: Copies of letters or letters?

Mr. Lane: One of them is a copy and the other is an original.

The Court: One is a copy of letter of January 8, 1953, from Ahearn Electric to the Navy Officer-in-Charge and the other is from that officer in response to it?

Mr. Lane: Yes, your Honor.

The Court: Do you offer this now?

Mr. Lane: Yes, your Honor.

The Court: Any objection?

Mr. Hoof: No objection.

The Court: Plaintiff's Exhibit No. 20 is received in evidence. [186]

* * *

EDWARD NOVICH

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lane:

Q. What is your name?

A. Edward Novich.

The Court: How do you spell your last [187] name?

The Witness: N-o-v-i-c-h.

Q. (By Mr. Lane): Where do you reside, Mr. Novich?

A. 2423 - 105 N.E., Bellevue, Washington.

Q. Where are you employed?

A. Westinghouse Electric Supply Company.

Q. How long have you been employed by that company?

A. Seven and one-half years.

Q. Were you employed by them during the year 1952? A. I was, sir.

Q. Are you acquainted with Mr. Ahearn?

A. Yes, sir. I am.

Q. And——

The Court: For my convenience, will you restate in what capacity you served the company, if you did, in 1952?

The Witness: At that time I was a lighting specialist.

The Court: With what company?

(Testimony of Edward Novich.)

The Witness: Westinghouse.

The Court: You may inquire.

Q. (By Mr. Lane): What were your [188] duties?

A. To assist the salesmen in lighting sales and to do engineering required in lighting sales.

Q. I believe you stated you are acquainted with Mr. Ahearn? A. Yes, sir. I was.

Q. Will you tell the Court the occasion of your acquaintance with him? I believe you only met him once, did you?

A. No. I met him a number of times, always on lighting problems, or while I was with Merritt in Bremerton on other lighting problems.

Q. Let me ask you this question then, Mr. Novich. State whether or not you had occasion in February, 1952, February or March, 1952, to go to Bremerton with Mr. Merritt Upson of the Westinghouse Company? A. Yes, sir.

Q. To call upon Mr. Ahearn?

A. At Merritt Upson's request, I accompanied him on a trip to Bremerton on March 10, 1952.

Q. And for what purpose did you go?

A. To make a lighting survey on a market in the Bremerton area at Mr. Ahearn's request.

Q. And did you and Mr. Upson call on Mr. Ahearn?

A. Yes, sir. We did immediately upon our arrival in Bremerton. [189]

Q. Will you tell the Court what happened on that occasion?

(Testimony of Edward Novich.)

A. Mr. Ahearn was present in the shop when we arrived——

Q. Now, you are speaking of his electrical shop?

A. His electrical shop on Sixth Avenue in Bremer-
erton.

The Court: What date was that again, please?

The Witness: March 10, 1952, sir.

The Court: You may inquire.

A. (Continued): Merritt promptly brought up the question of the quotation he had with him on latex cable and mentioned the price and the delivery, and at about that point Mr. Rockwell, Mr. Ahearn's superintendent, came into the shop, and the three of them discussed the latex cable and the substitution of it in place of paper-wrapped. Mr. Rockwell at that time made a statement that they probably ought to get that cable ordered because they couldn't wait until the arrival of the paper-wrapped. However, he wasn't about to order it. After a little further discussion on the cable, why, Merritt Upson, Mr. Rockwell, and myself went out for a cup of coffee. Mr. Rockwell then left Merritt and I, Mr. Upson and I, and we proceeded to make the lighting survey that I had come over for. At that place we received an order, and we returned to Mr. [190] Ahearn's shop on Sixth Avenue and told him we had received the order, and at that time Mr. Upson——

Q. The order for the lighting fixtures?

A. For the lighting fixtures, yes, sir. At that time Mr. Upson—I believe when we returned there

(Testimony of Edward Novich.)

was one other person present in the shop and it is just a vague recollection that a workman of Mr. Ahearn's was there.

The Court: Did, in your presence, Mr. Ahearn on that day, and also in the presence of Mr. Upson, say in substance and effect to Mr. Upson: "Go ahead and order the latex cable."?

The Witness: Yes, sir, he did.

The Court: Was Mr. Rockwell present then?

The Witness: No, sir. Mr. Rockwell had left us and proceeded to some other business.

The Court: You may inquire.

A. (Continued): After Mr. Ahearn placed the order with Mr. Upson, Mr. Upson asked Mr. Ahearn for the changed lengths which we had discussed earlier, which they had discussed earlier, and Mr. Ahearn went to his desk and dug through a whole bunch of papers and finally gave Merritt the revised lengths. Merritt and I thereupon left and went back to Seattle.

Q. Now, at that time, Mr. Novich, was the [191] difference in the price of cable discussed, between paper-wrapped and latex?

A. At the time the order was placed?

Q. Yes. A. Yes, it was.

Q. And do you have any recollection as to the amount of money that was involved or discussed in the difference between the two types of cable?

A. The difference in the two types was discussed as \$5,000 difference, as I recall.

(Testimony of Edward Novich.)

Q. And how are you able to definitely fix that date as March 10 that you went over there?

A. Because of the order that I received for some ruby lighting fixtures on that date. [192]

* * *

Cross-Examination

By Mr. Hoof: [193]

* * *

Q. Well, what would be your best estimate on time as to the hour of the day on the 11th when you arrived with Mr. Upson at Mr. Ahearn's place of business?

A. I wasn't in Mr. Ahearn's place of business on the 11th.

Q. On the 10th. Excuse me.

A. On the 10th, I would say it was probably in the [195] neighborhood of 1:30 or 2:00 o'clock.

The Court: Was it on the 10th that you had lunch on the ferry?

The Witness: Yes, sir.

Q. (By Mr. Hoof): About 1:30 or 2:00 o'clock.

A. Roughly.

Q. Now, how long did you remain in the shop?

A. Probably twenty-five to thirty minutes.

Q. During that time you have said that you were present, is that correct? A. That is correct.

Q. The entire period of time? A. Yes, sir.

Q. Mr. Upson was present the entire period of time? A. That is correct.

(Testimony of Edward Novich.)

Q. Mr. Rockwell was present, was he not, according to your testimony?

A. Not all of that time, no, sir.

Q. And how long was Mr. Rockwell there?

A. Mr. Rockwell came in some time between five or ten minutes after Merritt and I arrived.

Q. And was Mr. Ahearn there all the time?

A. Yes, sir. [196]

Q. Was Mrs. Ahearn there? A. No, sir.

Q. Was anyone else there?

A. At that time I don't believe so. I don't recall anyone else being in the shop.

Q. All right, sir. Now, your primary visitation to Bremerton was in connection with lighting fixtures that you have testified to?

A. That is correct, sir.

Q. And not in connection with this matter of the cable? A. No, sir.

Q. Will you tell me exactly what was said as between Mr. Ahearn and Mr. Upson regarding the latex cable in your presence?

A. At both meetings, sir?

Q. Sir? A. At both meetings?

Q. The first. I am taking the first meeting alone now, I would like to have you tell me.

A. I could not repeat Mr. Ahearn's exact words.

Q. I beg your pardon?

A. I would be unable to repeat Mr. Ahearn's exact words, sir. I don't have that good a memory.

Q. Well, will you give me, as best you can, [197] the conversation between Mr. Ahearn and Mr. Upson?

(Testimony of Edward Novich.)

A. Yes, sir. Mr. Ahearn, when we first came in, mentioned to Mr. Upson that they had received approval from the Navy to substitute the latex for the paper-wrapped, and, I believe, showed Mr. Upson that approval letter. Then Merritt and Mr. Ahearn discussed—let me rephrase that—Mr. Upson pointed out the price difference at that time, and just about then or a minute or so later, Mr. Rockwell came in. Mr. Rockwell entered the discussion, and as I recall, most of the discussion then, it was between Mr. Upson and Mr. Rockwell with Mr. Ahearn just standing by.

Q. And what discussion was had between Mr. Rockwell and Mr. Upson in Mr. Ahearn's presence?

A. Merely——

Q. Will you tell me what was said by whom to whom, if you can?

A. Yes. Mr. Rockwell made the statement that they would be unable to wait for the third quarter of '53 for the paper-wrapped cable, and that they ought to go ahead and get the latex cable ordered. However, he was not going to authorize that. It would be up to Mr. Ahearn.

Q. Now, at that time, was an order placed?

A. No, sir, it wasn't.

Q. Had Mr. Ahearn indicated any acquiescence at [198] that time?

A. Not to my knowledge, no.

Q. Then, you, Mr. Rockwell and Mr. Upson went for coffee? A. Yes, sir.

Q. And how long were you at coffee?

(Testimony of Edward Novich.)

A. Oh, possibly fifteen or twenty minutes.

Q. From there, I think your testimony is that you proceeded to some store or building?

A. Yes. I believe it was the Market Basket Market.

Q. The what?

A. The Market Basket is the name of the store.

Q. That would be a store? A. Yes, sir.

Q. And did Mr. Upson accompany you?

A. Yes, sir. He did.

Q. Were you figuring a job at the Market Basket store for Mr. Ahearn?

A. Yes, sir. I was.

Q. Did you figure the job?

A. No, sir. I didn't.

Q. Did you ever furnish to Mr. Ahearn an estimate? A. No, sir. I didn't. [199]

* * *

Mr. Hoof: I should like to have the witness handed, if you please, the Defendant's Exhibit No. A-1.

(Defendant's Exhibit No. A-1 handed to the witness.)

Q. (By Mr. Hoof): Mr. Novich, you now have Defendant's Exhibit A-1. That refers to ruby fixtures, I believe you testified? A. Yes. [200]

* * *

Q. Now, Mr. Novich, with that exhibit before you, I will ask you whether or not that particular order was not placed with your firm for the benefit

(Testimony of Edward Novich.)

of Mr. Upson in the following—that Mr. Upson had a friend whom he wished to favor with some fixtures at a discount, and the particular order through Mr. Ahearn was written for that purpose?

A. That is essentially correct, sir. [201]

* * *

Q. Do you recall the name of the store where you were to make a survey for lighting fixtures on behalf of the Ahearn Electric Company on the 10th day of March, 1952?

A. I have testified I thought the name was the Market Basket, sir. [202]

* * *

Q. I am going to suggest the name of the Thrift Market to you and ask you whether or not that is the store you surveyed?

A. That would be possible. I believe I stated that I thought the name was the Market Basket. I may have been mistaken. [203]

* * *

Q. Did you submit a figure on the lighting of the Thrift Market to Mr. Ahearn?

A. No, sir, I didn't.

Q. You did not. A. No, sir.

Q. Did you verbally suggest to Mr. Ahearn the prices of the fixtures for the Thrift Market?

A. No, sir, I didn't. Mr. Hoof, if you would like to have the reason, I would be glad to give it to you. The man had already made arrangements to buy the fixtures from another contractor.

(Testimony of Edward Novich.)

Q. I beg your pardon?

A. The manager of the market had already made arrangements to buy the fixtures from another contractor. [205]

* * *

Q. Now, one further question, I think, Mr. Novich. Could you in any way describe for me the other person, that is, you testified that you remembered some other person vaguely, as I recall your testimony? A. That is correct.

Q. That is, some other person being present, some other man, when you and Mr. Upson were at the shop. Could you describe him at all to me as to age, height, or physical characteristics?

A. I could make no positive identification, [207] sir, inasmuch as this person was in the background. I vaguely recall someone working in the shop the second time we were there at Mr. Ahearn's.

Q. Do you recall anything about his physical characteristics?

A. No, sir. I have since met him and heard that he was there, but I can't definitely recall it, that he was the person that was present.

Q. I beg your pardon?

A. I can't definitely state that Mr. Blackman was the person present. [208]

* * *

“LAWRENCE B. BLACKMAN

“called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows: [210]

“Direct Examination

“By Mr. Lane:

* * *

“Question: How old are you, Mr. Blackman?

“Answer: Thirty-nine.

“Question: Are you acquainted with John [211]
V. Ahearn? Answer: I am.

“Question: In what way are you acquainted with him?

“Answer: I worked for him for about a year; and I also had a re-wind shop, there.

“Question: A re-wind shop where?

“Answer: In Ahearn’s place of business,—and an appliance repair, together.

“Question: By a re-wind shop you mean re-winding what? Answer: Motors.

“Question: Electric motors?

“Answer: That is right.

“Question: Mr. Ahearn was an electrical contractor was he? Answer: That is right.

“Question: During what time did you work for him, do you recall?

“Answer: Let’s see, now. I went to work for him around in December of ’51. I worked for him until some time in December in ’53. [212]

* * *

(Deposition of Lawrence B. Blackman.)

“Question: Were you with Mr. Ahearn at the time he received quotations from Westinghouse Electric Supply Company?

“Answer: Yes. They were received in the shop of Ahearn’s. I was there at the time.

“Question: Were you there at the time the quotations came in by mail? Answer: I was.

“Question: Did you see the quotations, at that time? Answer: I did.

“Question: I show you, Mr. Blackman, what has been marked for identification as Plaintiff’s Exhibit B and ask you if that is the quotation that Mr. Rockwell received from Westinghouse, at that time?”

Mr. Lane: I was going to get the correct [214] number of that now for your Honor’s convenience. I believe that is Plaintiff’s Exhibit No. 3. I presume that we substitute——

The Court: When reading, you should read what is now the number and not what was used to be the number.

Mr. Lane: At the bottom of Page 5, Exhibit B should read Exhibit 3 now, your Honor.

The Court: Let the record show that. Hereafter, instead of B, say 3.

“Mr. Hoof: Are we talking about Rockwell or Ahearn?

“Mr. Lane: I mean——”

The Court: You settled that when you said Ahearn.

(Deposition of Lawrence B. Blackman.)

Mr. Lane: "Rockwell" up above on the first line should be "Ahearn" too.

The Court: Let the record show that and read the answer at Line 7.

"Answer: Yes, I have seen this a number of times.

"Question: (By Mr. Lane): Did Mr. Ahearn discuss [215] this quotation with you, at that time?

"Answer: Not so much with me as it was with Mr. Rockwell. I was a bystander, listening in.

"Question: Was there any discussion, at that time, as to the use of paper-wrapped lead cable and latex-covered cable?

"Answer: There was by Mr. Ahearn, but he just laughed and said that it was so high priced that anybody would be a fool to put it in when they could put in paper and lead.

"Question: He was referring to what?

"Answer: The telephone cable, at the time.

"Question: What was he referring to when you say that it was so high?

"Answer: The difference in price.

"Question: Between the two?

"Answer: Yes; between the latex and lead or the paper and lead.

"Question: Do you have any recollection of a meeting in Mr. Ahearn's office, later, with reference to the use of latex or paper-wrapped wire?

"Answer: The only meeting that I know of was the one between him and Merritt.

"Question: Do you mean Mr. Ahearn and Mer-

(Deposition of Lawrence B. Blackman.)

ritt? Answer: Yes, that is right. [216]

“Question: Do you know what occurred, at that time?

“Answer: Mr. Ahearn was kind of mad at Rockwell, and said that he would show him who was boss, and that he was ordering the latex because he wasn’t going to wait another year before he could draw his money.

“Question: Could you place the time of that meeting?

“Answer: That was somewhere in March or April. I couldn’t place the date exactly as I never put any emphasis on it, at the time

“Question: Well, let me ask you this question: At that time, Merritt Upson came over from Seattle, did he not?

“Answer: Yes,—with another man with him.

“Question: Do you recall that man’s name?

“Answer: No. I don’t recall his name.

“Question: Do you recall whether Mr. Upson, at that time, gave to Mr. Ahearn a letter (Handing copy of letter to the witness)?

“Answer: Yes. I have seen this letter, here.

“Question: I show you what has been marked as Plaintiff’s Exhibit E——” [217]

The Court: Has E been marked by any other name or number?

Mr. Lane: “E” is now known as 8, your Honor.

The Court: Let the record show that. Hereafter when you mention “E,” speak of 8.

(Deposition of Lawrence B. Blackman.)

“Question: —and ask you if you have seen that before and when you saw it?

“Answer: I have seen that. I saw that letter in the first portion of the year, right after it came. I think it was on the same day that it was opened.

“Question: At that time, that Mr. Upson was there, what was the discussion between he and Mr. Ahearn?

“Answer: That is, during the ordering of the latex?

“Question: Yes.

“Answer: Well, he said that he wasn't going to wait the year; that he was going to show Mr. Rockwell who was boss and told Merritt to go ahead and order it, and placed the order with Merritt, at that time. But he had quite a bit of trouble finding the information as to the lengths of it because he had had two or three coffee royals, at the time, and I had to help him find measurements of the wire so that Merritt could get the lengths that were needed in the yard. [218]

“Question: Had the amount of wire that was needed,—the amount of cable—had that been refigured?

“Answer: Yes, it was.

“Question: From the time of the original estimate?

“Answer: That is right; right after Mr. Rockwell had got some changes through, why, we went down and re-measured them again so that there would be no waste.

(Deposition of Lawrence B. Blackman.)

“Question: And you helped re-measure that?

“Answer: I did.

“Question: With Mr. Rockwell?

“Answer: That is right.

“Question: What was Mr. Rockwell’s position on this job? Answer: Foreman.

“Question: Foreman of this job at the Navy Yard?

“Answer: Of this job; that is right.

“Question: You say that on this date that Mr. Upson was there, you had to look around and find Mr. Rockwell’s calculations to determine the correct amount of wire to order?

“Answer: That is right.

“Question: Were those amounts given to Mr. Upson? [219]

“Answer: They were.

“Question: Did you hear Mr. Ahearn make any statements as to ordering the wire?

“Answer: Yes. Mr. Ahearn gave him definite orders to send the Latex.

“Question: At that time, was there any discussion as to the price of the Latex?

“Answer: Yes. But Merritt, at that particular time, didn’t have the information on it—of what the cost was—and I know that he called Seattle and told Mr. Ahearn that he would be back as soon as he could get the definite cost on it.

“Question: So that on that day he did not have the definite costs on it?

“Answer: No, he didn’t: only approximate.

(Deposition of Lawrence B. Blackman.)

“Question: Was there any discussion as to the approximate cost?

“Answer: Yes, there was.

“Question: What was that discussion; what was the context of it?

“Answer: I don’t remember exactly what it was, but it sticks in my mind it was somewhere around \$5,000 difference.

“Question: Between what?

“Answer: Between paper and lead or latex and [220] lead.

“Question: You mentioned that there had been some changes made and that was one of the reasons why the amount of wire needed was different. What were those changes, do you recall?

“Answer: Well, they were in connection with the telephone cabinets; but I wasn’t given all of that information, at the time—just snatches of it here and there. All I knew of it, at the time, was that there were some changes in the telephone cabinets.

“Question: At that time, do you know whether or not Mr. Upson wrote out an order?

“Answer: Yes, he did.

“Question: Did he do it in your presence?

“Answer: He started in my presence. I don’t know whether the order was completed, but I do know that he started to write it out, because some of my work at that time in winding motors carried me into the back room and some portions of it I missed.

(Deposition of Lawrence B. Blackman.)

“Question: The room that you and Mr. Upson were in at the time you heard that conversation, how large was that room?

“Answer: That room was approximately ten by twelve, except that it had shelves down it on each side, and a desk across one end; and that just about took up [221] everything. On one side of that room I had my work bench. I had my rewind machine in the back room which was adjacent.

“Question: I show you what has been marked as Exhibit G”——

Mr. Lane: Exhibit G is now 10, your Honor.

The Court: Let the record show that, and hereafter you may refer to 10 when speaking of Exhibit G.

“Question: ——Mr. Blackman, and ask you if you have ever seen that before?

“Answer: Yes. This was the one that Merritt started to write out, while I was there.

“Question: In your presence?

“Answer: That is right. That is the one that we were getting the lengths for.

“Question: This order was written up under date of March 10, 1952. Would you state to the best of your recollection whether or not that was the date that Mr. Upson was in Mr. Ahearn's office?

“Answer: As far as the exact date, I naturally never made any note of it but, as near as I can tell, it would be somewhere in the approximate vicinity. It was March or April I know that it was done,

(Deposition of Lawrence B. Blackman.)

but I never [222] thought anything about it at the time other than just casual thought.

“Question: On that date what were you doing; how did you happen to be in Mr. Ahearn’s office?”

“Answer: I was rewinding motors.

“Question: That was the second time that you had been in Mr. Ahearn’s office, rewinding motors, when Mr. Upson called, is that right?”

“Answer: I was there most of the time when he called—either working on appliances or rewinding motors.

“Question: Do you know whether or not this Exhibit 10 was received by Mr. Ahearn in the mail?”

“Answer: Yes. He had copies of that one.

“Question: And you saw the copies in his office in his files, did you? Answer: Yes.

“Question: It had the price on and the quantities for the cable?”

“Answer: The first copy that he had didn’t have the price on it. The price must have come later.

“Question: Did you see this Exhibit 10 with the prices on it? Answer: Yes, I did.

“Question: Now I hand you what has been [223] marked as Exhibit H.”

The Court: Is that 11?

Mr. Lane: It is Exhibit 11, your Honor.

The Court: Let the record show that it has been changed in this trial to Plaintiff’s Exhibit No. 11.

“Mr. Lane: There is no question about these exhibits we are referring to, is there, Mr. Hoof?”

“Mr. Hoof: No.

(Deposition of Lawrence B. Blackman.)

“Question (By Mr. Lane, continuing): Did you ever see that typewritten copy?

“Answer: No. I never happened to see this particular typewritten copy.

“Question: Do you know whether or not Mr. Ahearn contacted the Navy with reference to this change from paper-wrapped lead wire to latex covered wire?

“Answer: No. I don’t know whether he did or whether he had Mr. Rockwell do it. That I don’t know. But he was very adapted to where something could be changed from one to the other and specified, in the original specifications, he was very adapted to changing from one to the other because if he couldn’t get one he could get the other.”

Mr. Hoof: I am going to, at this time, [224] move to have the last portion of the answer after the words “That I don’t know,” the last portion of the answer, stricken as not responsive to the question, commencing with the words “But he was very adapted to.”

The Court: I think that is something that is not called for by the question. It is stricken, and the Court will disregard it.

“Question: I believe you mentioned that there was a little ill feeling between Mr. Ahearn and Mr. Rockwell? Answer: That is right.

“Question: When did that occur and what caused it, do you recall?

“Answer: That was caused by Mr. Ahearn going

(Deposition of Lawrence B. Blackman.)

in the Navy Yard in an intoxicated condition. Some of the guards and inspectors there didn't like it."

Mr. Hoof: Well, I think I had better object now, at this time, your Honor, to any question of Mr. Ahearn going into the Yard in an intoxicated condition insofar as the testimony of Mr. Blackman is concerned. The later examination, as I recall, shows that he had no personal knowledge. I may be mistaken. However, I believe it shows he had [225] no personal knowledge of any such event occurring. I could be mistaken on that.

The Court: That motion is denied.

"Question: How would that affect the relationship between Mr. Rockwell and Mr. Ahearn?

"Answer: I guess they expected Mr. Rockwell to cover up for him, but he wouldn't do it.

"Question: Do you know when the cable arrived on the job?

"Answer: That was in the latter part of December or the first part of—

"Question: That is December of 1952?

"Answer: Yes—or the first of January. It was right around in there close. It seems to me it came just before or just after the holidays.

"Question: Do you know whether the cable stayed there for any length of time before it was pulled?

"Answer: To the best of my recollection it was about two weeks that it set there. The day that it come, I know Mr. Rockwell got a little excited and

(Deposition of Lawrence B. Blackman.)

called Seattle about it. And the next day Merritt was over. [226]

* * *

“Question: Do you recall of any conversation, after the cable came, about the price of it—the increased cost?

“Answer: No. After the cable come, why he didn’t say much about that. As a matter of fact, I wasn’t very closely connected with him, then.

“Question: You had left him, had you?

“Answer: I had left him and was working for Mr. Rockwell, then, in his new establishment.

“Question: Then you did work with Mr. Rockwell in pulling the wire, did you? [227]

“Answer: I did.

“Question: And at that time you were working for Mr. Rockwell instead of Mr. Ahearn, is that it?

“Answer: That is right.

* * *

“Question: Do you know whether it was customary for him to receive from Westinghouse copies of the orders that were placed with Westinghouse?

“Answer: Oh, yes. A lot of them he threw in the wastepaper basket when they came. I had to dig them out of the wastepaper basket at times for Rocky—for the information he wanted.

“Question: I show you what has been marked document that would come from Westinghouse?”

(Deposition of Lawrence B. Blackman.)

Mr. Lane: I think that is Exhibit No. 14, your Honor, if I am not mistaken.

The Court: No. 14 is the group of [228] orange-colored sheets of paper.

Mr. Lane: Yes, that is it.

“Answer: Yes; that is the type. Maybe there are some in here that I have actually seen before. The third sheet, here I have seen it before; the fourth sheet; the fifth one; and the sixth sheet, here, I have seen that before; the seventh one, I have seen that one; I have seen the ninth one, here, too. I have seen the tenth one; and the eleventh one; and the twelfth one; the thirteenth one; the fourteenth one; the fifteenth one; the sixteenth one and the seventeenth one. I have seen that many of them that I know definitely I have seen them.

“Question: Did Mr. Ahearn keep his records in this room, in which your workshop was located, on this job?

“Answer: No. Part of the records were in there. He kept some of them in the oven that he was using for an extra desk, there.

“Question: The oven of what, now?

“Answer: The oven of a new range that he had there for sale. Some of them he kept in the drawer and some of them he stuck in his pocket. When we did search, we searched all over every place, including the [229] wastebasket.

“Question: Do you say that he threw copies of these orders in various places, including the waste-paper basket, at times?

(Deposition of Lawrence B. Blackman.)

“Answer: Yes. Some of the copies I dug out of the wastepaper basket so that Rocky could check the material. [230]

* * *

“Cross-Examination

“By Mr. Hoof:

“Question: Mr. Blackman, by whom are you employed, now?

“Answer: I am employed by Mr. Rockwell, right now.

“Question: How long have you been employed by Mr. Rockwell?

“Answer: Let's see; I went on with him right after the first of the year, when we finished with Mr. Aiken.”

Mr. Lane: I think that should be Ahearn, should it not?

Mr. Hoof: I think that is correct. [231]

* * *

“Question: And you have been a steady employee of his ever since, have you?

“Answer: That is right, sir.

“Question: With whom have you talked concerning your deposition immediately prior to the taking of your deposition?

“Answer: We came in here this morning and talked about it.

“Question: Mr. Lane? Answer: Yes.

“Question: Mr. Rockwell?

(Deposition of Lawrence B. Blackman.)

“Answer: Just this morning.

“Question: Mr. Rockwell, too?

“Answer: Yes; he was here.

“Question: Was Mr. Flechsig here?

“Answer: Merritt was here and all of these other fellows here were in, and there was one more man from Westinghouse.

“Question: At that time, did you take a look at Exhibit 3? Answer: Which one is 3?

“(Document handed to the witness.)

“Question: At that time, did you take a look at [232] Exhibit 3? Answer: Yes, I did.

“Question: Did you also take a look at Exhibit 8 (indicating document to the witness)?

“Answer: Yes, I did.

“Question: Did you take a look at Exhibit 10 (indicating document to the witness)?

“Answer: Yes, I did.”

Mr. Lane: Your Honor, I have no way of checking these numbers.

Mr. Hoof: I am taking them from where you marked them.

Mr. Lane: I presume they are right.

“Question: Did you take a look at Exhibit 11 (indicating document to the witness)?

“Answer: Yes; I looked at it.

“Question: Then you took a look also at Exhibit 14 (indicating document to the witness)?

“Answer: That is right.

“Question: Of the four or five exhibits, here,

(Deposition of Lawrence B. Blackman.)

that have been just listed, being Exhibits 3, 6, 10, 11 and 14—and I am now going to hand the group over to you—which of these records, if you will tell me, please, are records of the Ahearn Electric Company? [233]

“Answer: Do you mean that should be in his files or that I have seen in his files?

“Question: Which of those records are records of the Ahearn Electric Company?

“Answer: I would like to get that defined a little more so that I understand just what you mean.

“Question: It is very simple. I want you to tell me which of these documents that I have handed you are records of the Ahearn Electric Company.

“Mr. Lane: If you know.

“Answer: Well, I know that most of these in Exhibit 14 were in his records, in his files.

“Question (by Mr. Hoof): They are from the files of Ahearn?

“Answer: They were in his files.

“Question: Were these particular records in his files?

“Answer: They may be copies of what were in his files. I may not know one sheet from the other, as far as actually being in his files is concerned.

“Question: Was that Exhibit 11?

“Answer: This is Exhibit 14—that he had copies of this or that he did have them in his files. This one here, which is marked Exhibit 11, I have never seen that one before. And this one here, which [234]

(Deposition of Lawrence B. Blackman.)

is Exhibit 10—the one that he had in his file was a different colored copy.

“Mr. Lane: What color was it, if you remember?

“The Witness: If I recall correctly, it was yellow.

“Answer (Continuing): And this one here which is Exhibit 6 looks to be a copy of the one that he had in his files. And this one which is marked Exhibit 3 looks just like the one he had in his file or a copy thereof.

“Question: You understand that you are under oath? Answer: That is right.

“Question: Exhibit 11 is the one that you said you never saw before?

“Answer: That is right.

“Question: With reference to the rest of the documents that we have just referred to, are you prepared to state under oath that they are exact duplicates of documents that you have previously seen in the Ahearn files?

“Answer: All except those that I did not mention of it—let’s see, I believe that is Exhibit 14—there are some of those that I didn’t mention previously that I don’t remember seeing. Those [235] that I did remember seeing, I stated so by the number of the page that it was on—numbering from the top down.

“Question: How long has it been, up until this morning, since you have seen documents such as these or similar to these?

(Deposition of Lawrence B. Blackman.)

“Answer: I am in and out of the shop all of the time and they still come into Rockwell’s shop from different companies like that.

“Question: I am speaking of these exhibits just referred to; how long has it been since you have seen anything like this?

“Answer: Since I have seen those, it has been about a year or maybe a little bit longer than a year.

“Question: Is it considerably longer than a year?

“Answer: Yes, it is longer than a year. [236]

* * *

“Question: What trouble did you have with Mr. Ahearn?

“Answer: Well, as far as that goes, when I would repair an appliance or something, Mr. Ahearn was very adapted to destroying the ticket and putting the money in his pocket.

“Question: How long did such events occur?

“Answer: I would say about six months before I left him. [237]

“Question: Was that the reason you left?

“Answer: No.

“Question: Why did you leave him?

“Answer: Because he was going to close up his shop, and I was tired of it anyway, and Mr. Rockwell was going to open his, so I decided it was a darned good time to get away from him.

“Question: As a matter of fact, Mr. Ahearn was a benefactor of yours, was he not?

(Deposition of Lawrence B. Blackman.)

“Answer: No.

“Question: What is that?

“Answer: I don’t consider him as such.

“Mr. Lane: Counsel, what do you mean by benefactor? I don’t know and I don’t know that the witness knows.

“Mr. Hoof: I think he understands.

“Mr. Lane: Well, I don’t understand, and if I don’t, maybe he doesn’t.

“Mr. Hoof: He has answered the question.

“Question (By Mr. Hoof): You had no work when you went to work for Mr. Ahearn?

“Answer: I had been working for Mr. King, previous to my employment with him, and I went up there at that time of the year to find out if there was anything that he had. [238]

“Question: Well, Mr. King discharged you, did he not? Answer: That is right.

“Question: So you were without employment?

“Answer: I was without employment, at the time.

“Question: Do you know why Mr. King discharged you?

“Answer: That is right; on account of union activities.

“Question: You went to Mr. Ahearn and he allowed you to set up your own shop?

“Answer: He put me to work, first; and then I set up my shop a couple of months later.

“Question: He allowed you to run your shop in his place upon a percentage basis?

(Deposition of Lawrence B. Blackman.)

“Answer: That is right; upon a percentage basis, and that I pay 25% of the phone bill, which I did.

“Question: Your contention is that you left Mr. Ahearn because he was stealing from you?

“Answer: No. I said I did not leave him for that reason. I knew he was doing it.

“Question: Can you establish any particular theft?

“Answer: I could establish a number of them, but I don't care to press charges and go into [239] that, unless it is necessary.

“Question: I am going to come back to that in just a little bit. Now, the testimony of Mr. Upson was that he was in Bremerton on the 10th day of March, 1952, with reference to the matter of the telephone cable. Mr. Upson has testified to that date. Mr. Upson has testified that that is the date that he discussed the matter of changing the cable from the paper-sheathed to the latex. Is that the date you were present?

“Answer: I believe it was.

“Question: Who else was present?

“Answer: Mr. John Ahearn, myself, Merritt and one more man from Westinghouse that had come over to estimate some lighting in one of the downtown stores.

“Question: Where were you?

“Answer: I was in Ahearn's establishment there, winding motors.

(Deposition of Lawrence B. Blackman.)

“Question: Where was the winding shop with reference to the room where the discussion is said to have taken place?

“Answer: Right in the room.

“Question: In the same room?

“Answer: That is right.

“Question: How many hours did you wind motors that day? [240]

“Answer: Oh, I don't know. As a usual rule, about that time of the year, I was winding until quite late at night—sometimes to as late as nine o'clock.

“Question: What time did you start winding motors in the shop, there?

“Answer: I usually started in around seven or seven-thirty and sometimes worked as high as up past nine or nine-thirty, depending on the way the load went.

“Question: On this particular date, how many discussions took place between Mr. Ahearn and Mr. Upson, that is, I am speaking of how many separate occasions was there a discussion in the office?

“Answer: Only the one that I seen.

“Question: What time of the day was that, please?

“Answer: If I remember rightly, it was right after dinner.

“Question: Would that be at or around twelve o'clock noon or thereafter?

“Answer: Yes; between 12:30 and 2:00—somewhere around in there.

(Deposition of Lawrence B. Blackman.)

“Question: Was there any discussion in the morning of that day?

“Answer: Not between Merritt—or between the Westinghouse representative and John, that I know of. [241]

“Question: Were you in the winding then?

“Answer: I was back and forth between where my winding machine was located and the front, where I done my winding. You see, I made the coils in the back. There were a lot of times people would come in when he was there and I would wind coils, and the noise of the machine sometimes made it impossible for me to hear what was going on. As a matter of fact, I never paid much attention, anyway. It was only when I was laying the coils of wire in the motor and taping them up that things were quiet, there, and I could hear everything that went on.

“Question: Were you there all of that afternoon from lunch time on?

“Answer: Yes, as near as I can recall.

“Question: Was there a time book kept on your hours as to where you were employed and otherwise?

“Answer: No, there wasn't. Because the re-wind portion of it, I done it as I felt like. If Mr. Ahearn had a call job for me to go out on, I would go out on the call job. When there was no call job to go on, I was winding or repairing appliances.

“Question: Other than repairing appliances was a time book kept?

(Deposition of Lawrence B. Blackman.)

“Answer: Yes; there was a time book [242] kept. It was in Mr. Ahearn’s possession.

“Question: Who kept the time book?

“Answer: I kept the time book for him.

“Question: You marked down your hours did you?

“Answer: That is right; any time that I was there.”

The Clerk: Defendant’s Exhibit No. A-2 .

(Time book marked Defendant’s Exhibit No. A-2 for identification.)

“Question (By Mr. Hoof): I am going to hand you what has been marked as Exhibit A-2 for identification and ask you to state what that is, if you know.

“Answer: This is the time book.

“Question: The one that we just referred to?

“Answer: The one that we just referred to. I notice that there are a number of entries here, too, that are not even in my handwriting.

“Question: I want you specifically to turn to the month of March, 1952, and I want you to refer to the day of March 10th. For your convenience I am going to lift the payroll receipt up. (Lifting small pink slip of paper.) The sheet that I have now referred you to—which I am going to later ask the reporter to mark [243] and which has attached to it the pink sheet—is your time sheet for the days of March 10th, 11th, 12th, 13th, 14th, and 15th, 1952, are they not?”

(Deposition of Lawrence B. Blackman.)

Mr. Hoof: Now, I wonder, on the page with the pink sheet on it, since the reporter marked that page, whether or not I could have it marked by the Clerk so there will be no question as to the sheet that is under discussion.

The Court: Let it be marked.

The Clerk: Defendant's Exhibit A-2.

(Pink sheet in time book likewise marked Defendant's Exhibit No. A-2 for identification.)

"Answer: Let me check back and make sure. (Perusing time book.) This one is January. This one is for February. This is the first of March. Yes; that would be the 10th of March.

"Question: Under date of March 10th it says, "Navy Yard 8 hours," does it not?

"Answer: That is right.

"Question: Under date of March 11th, "Navy Yard, 8 hours"? Answer: That is right.

"Question: Under date of March 12th, "Navy Yard, [244] 4 hours"?

"Answer: That is right.

"Question: And then after the "4 hours," hours allocated to other particular work?

"Answer: That is right.

"Question: And then again on the 13th, "Navy Yard, 8 hours"? Answer: That is right.

"Question: What this book says and what it means, Mr. Blackman, is it not—

"Answer: I am not saying it was March 10th. It was approximately around about that date. But

(Deposition of Lawrence B. Blackman.)

I was in the shop the day he was in there and I heard that. And I found the necessary lengths out of the book. I might explain this, too. Many times I would work in the Navy Yard and come into the shop on other things for shop work and take it back into the yard, too. That is also listed under Navy Yard work.

“Question: The 8 hours and the 8 hours and the 4 hours are in your handwriting, are they not?”

“Answer: That is right; they are.

“Question: So that you allocated yourself 8 hours to Navy work on that particular date—on the 11th of March, 1952?”

“Answer: That is right. [245]

“Question: The same on the 10th?”

“Answer: That is right.

“Question: I want you to look at this, if you will, please, Mr. Blackman, and where the reporter has marked Exhibit A-2 in the Exhibit A-2, that is the page we have been referring to?”

“Answer: That is right.

“Question: Are you able specifically to tell me, Mr. Blackman, what work at the Navy Yard you were doing on March 10, 1952, or March 11, 1952?”

“Answer: No, I couldn't tell you exactly or specifically what I was doing.

“Question: Do you think that the meeting you have referred to might have occurred upon some other date?”

“Answer: It could be a few days previous or it could be a few days later.

(Deposition of Lawrence B. Blackman.)

“Question: From reference to your time book, would you not think it might be some other date?

“Answer: I would think so.

“Question: And your normal reaction, from looking at the time book, would be that your day would be devoted to Yard work, on those two dates at least?

“Answer: Yes; on those two days I imagine it would have been. [246]

* * *

“Question: Any work you might have done in the shop, though, for the Navy Yard job, Mr. Blackman, would it not be done on the re-wind bench?”

* * *

“Answer: It would not be done on the re-wind bench, but it would be in the shop because we had a very limited amount of space to do that work in the shop. [247]

* * *

“Question: How did you happen to come to Seattle to testify in this matter?

“Answer: Mr. Rockwell asked me if I would come.

“Question: And he being your employer, you acquiesced?

“Answer: I told him yes I would come. [248]

* * *

“Question (By Mr. Hoof): You testified that on the day in question—and we are now speaking

(Deposition of Lawrence B. Blackman.)

about the 10th day of March, 1952—that Mr. Ahearn had had two or three coffee royals?

“Answer: That is right; I did.

“Question: Where did he have those?

“Answer: At the little restaurant and bar which was between 4th and 5th on Broadway.

“Question: What was the name of that place?

“Answer: I don’t recall the name of that little restaurant, right now.

“Question: What time did Mr. Ahearn have the coffee royals?

“Answer: Well, if I kept track of what times he had coffee royals, I would have an awful time.

“Question: At what time on this day did Mr. Ahearn have the coffee royals?

“Answer: I know he had some around noon.

“Question: Were you present with him?

“Answer: Yes. I went down and had a cup of coffee with him.

“Question: At what time? [249]

“Answer: It was somewhere around noon.

“Question: Was he competent or was he incompetent by virtue of these coffee royals?

“Answer: I would say that most of the time it didn’t have too much effect on him except that he wasn’t good to navigate on his feet. He seemed to be fairly clear headed even when he did have a number of them. He just didn’t seem to be able to get around good.

“Question: Did Mr. Ahearn have coffee with Mr.

(Deposition of Lawrence B. Blackman.)

Upson or the other gentleman that was along, Mr. Novich?

“Answer: At the time he had those, I don’t believe they were along. It was just Mr. Ahearn and myself at that particular time.

“Question: Would you fix it as immediately after lunch on that day that Mr. Ahearn discussed this matter with Mr. Upson and the other man?

“Answer: I would say it was closer to 2:00 o’clock.

“Question: Two o’clock?

“Answer: It was in the afternoon; yes.

“Question: You are positive, of course, that there were the four of you present when this discussion took place?

“Answer: Yes. The thing that recalls it clearest to my memory, that the cable was brought up, [250] was because we had an awful time finding the measurements. I was just about to give up and go into the Navy Yard and get hold of Mr. Rockwell to get the measurements all over again, because we were having so much difficulty finding the lengths.

“Question: You are positive that the other gentleman from Westinghouse was present as you say, when the agreement was made?

* * *

“Question: Is the little restaurant that you are referring to the one at which you had coffee frequently or lunch frequently?

“Answer: Yes. I had lunch in there a number of times. When there was nothing to do, I would drop

(Deposition of Lawrence B. Blackman.)

down to have a cup of coffee. And I used to eat dinner down there any time that I had to stay over late, in the evening or something. I would stop down to have a meal. [251]

* * *

“Question: And you can’t remember the name of it?

“Answer: I don’t recall what the name of it was.

“Question: You are still, however, able to remember the exact sheets from Exhibit 14?

“Answer: If you had hunted through those things and tried to keep track of them for John as hard as I did, you would remember them, too,—that any time you seen a glance of anything like that, where you had to grab it and put it away for him, in order to keep the thing where he could find it, why, you would get acquainted with them, too.

“Question: You are positive, of course, in your own mind I imagine, that the fact you feel Mr. Ahearn, in effect, stole money from you through what you claim tearing up tickets and pocketing the money has nothing [252] to do with what you have stated here?

“Answer: Absolutely nothing. [253]

* * *

“Question: When did Mrs. Ahearn come to the office for the purpose of typing and doing the office work?

“Answer: She started doing the office work somewhere along in April, I do believe. It was somewhere in that vicinity.

(Deposition of Lawrence B. Blackman.)

“Question: Of 1952?

“Answer: Yes. She only come over there spasmodically, though. A big percentage of her work she did inside of the house, itself. After she once started, then she would bring the papers out there.

“Question: What do you mean ‘at the house,’—their home?

“Answer: Their home was right alongside of the shop. Sometimes she would take the papers over there and work on them and bring them back into the shop.

“Question: Did she keep the records from April, 1952?

“Answer: Yes; from then on she did all of the record keeping.

“Question: Could it be possible she started before then? [255]

“Answer: It could be possible she started some before that. I know I was very glad to get out of the job of typing some of them, as soon as she consented to come out and do that. I done it for the lack of having something to do, at times, just to help get the job under way. But I actually was glad to see Mrs. Ahearn get it.” [256]

* * *

“ARTHUR L. ROCKWELL

“called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

“Direct Examination

“By Mr. Lane:

“Question: Would you state your name, please?

“Answer: Arthur L. Rockwell.

“Question: Where do you live, Mr. Rockwell?

“Answer: Moses Lake, Washington.

“Question: You have lived there for how long?

“Answer: A little over a year.

“Question: Previous to that time you lived where? [261]

“Answer: In Bremerton.

“Question: What business are you engaged in?

“Answer: Electric contracting business.

“Question: What is your age, Mr. Rockwell?

“Answer: Forty-six.

“Question: Were you acquainted with John V. Ahearn? Answer: Yes, I was.

“Question: In what way are you acquainted with him?

“Answer: I have known him for several years. I worked for him in '52 and part of '53.

“Question: Did you work for him in connection with the repairs and installation of an electric distribution system in the Puget Sound Naval Shipyard? Answer: I did.

“Question: That was a contract that he had in

(Deposition of Arthur L. Rockwell.)

1952 to repair and install their telephone system in their quarters area?

“Answer: Yes; telephone and power system.

“Question: Telephone and power?

“Answer: Yes.

“Question: Had you been with Mr. Ahearn prior to this job, Mr. Rockwell?

“Answer: A couple of months. [262]

“Question: Did you figure the estimates on this job? Answer: I did.

“Question: At whose request?

“Answer: Mr. Ahearn’s.

“Question: After figuring those estimates, will you state whether or not you requested a quotation from Westinghouse Electric Supply Company?

“Answer: I did.

“Question: Did you personally request a quotation for the Ahearn Electric Company from the Westinghouse Electric Supply Company, Mr. Rockwell? Answer: I did.

“Question: Do you recall who you talked with and when it was?

“Answer: I talked to Mr. Schindler, the take-off man at Westinghouse, about two weeks before the letting of the job, as I remember.

“Question: Did you ask him for a quotation?

“Answer: I did.

“Question: Was that quotation furnished to the Ahearn Electric Company by Westinghouse?

“Answer: Yes, it was.

“Question: I show you what has been marked as

(Deposition of Arthur L. Rockwell.)

Exhibit B, Mr. Rockwell, and ask you what that document [263] is, if you know?

“Answer: This is a Westinghouse quotation of some of the various materials to be used on the job. There were other materials to be used on the job that they didn’t furnish,—such as concrete, reinforcing steel, metal covers—manhole rings.

“Question: The date of that quotation was what?

“Answer: 31st of January, ’52.

“Question: Do you recall whether or not that was the approximate time that you got it?

“Answer: Yes, it was.

“Question: Was it sent in the mail or was it delivered?

“Answer: It was sent to Mr. Ahearn in the mail.

“Question: At the time you requested a quotation from Westinghouse, was there a request for a quotation on latex-covered cable?

“Answer: No.

“Question: Why not?

“Answer: Well, they don’t handle latex, to begin with. They quoted paper and lead, and paper and lead was approximately—as I remember—about five thousand and some dollars cheaper than latex.

“Question: Was that discussed between you and [264] Mr. Ahearn, if you recall?

“Answer: The prices and everything were brought up, figuring paper and lead. I never considered latex because of the price.

“Question: Did you get quotations from any other electric supply people?

(Deposition of Arthur L. Rockwell.)

“Answer: We did. We received them from Graybar,—and there was ‘G. E.’ and another company. I don’t remember the name of it but there were several quotations.

“Question: You saw this quotation that came in from Westinghouse, did you, Mr. Rockwell?

“Answer: Yes, sir.

“Question: You are positive that at that time a request was not made from Westinghouse for a quotation on latex, is that your testimony?

“Answer: That is right.

“Question: What was your position on the job, Mr. Rockwell?

“Answer: I was foreman on the job. [265]

* * *

“Question: After these quotations came in, would you state whether or not there was a breakdown submitted to the Navy by the Ahearn Electric Company?

“Answer: After the letting of the contract there was a breakdown submitted to the Navy.

“Question: Based upon what?

“Answer: Paper and lead.

* * *

“Question: Did you have any knowledge that he had ordered the latex covered wire in March, ’52?

“Answer: No. I didn’t know anything about any latex until January of ’53.

“Question: I see. So that during all of that year

(Deposition of Arthur L. Rockwell.)

you had no knowledge of latex having been ordered on the job, is that your testimony?

“Answer: No; I had no knowledge. [266]

* * *

“Question: So that about October 1st the job was completed except for pulling this telephone cable?

“Answer: Yes,—except for miscellaneous little items to be taken care of.

“Question: Do you recall when the cable arrived?

“Answer: As I remember, it was right around New Years or right after the holidays.

“Question: Was the cable there at the job [267] for some time prior to being pulled?

“Answer: It was about a week or ten days it set there prior to the pulling of the wire.

“Question: You had ordered a considerable amount of the materials that were used in this job, had you not, Mr. Rockwell?

“Answer: I did, yes.

“Question: You had authority to order them?

“Answer: Yes, I did.

“Question: From Mr. Ahearn?

“Answer: Yes.

“Question: Is there any explanation or any reason why you did not order the latex wire?

“Answer: I had a twenty-five per cent interest in the job and there was a little over \$5,000 difference, and I saw my twenty-five per cent taking wings if that was ordered.

(Deposition of Arthur L. Rockwell.)

“Question: That differential in cost had been discussed between you and Mr. Ahearn, had it?

“Answer: Yes. I had explained to him the difference in the cost of latex and paper and lead telephone wire.

“Question: He was familiar with what latex cost, generally, was he not?

“Answer: Yes, he was. [268]

“Question: After the first of the year, January of '53, did you have occasion to call the Westinghouse people about the latex wire?

“Answer: Yes.

“Question: Who did you call and what was said?

“Answer: I called Mr. Flechsig on it and asked him how come the change. He didn't know anything about the change, and that is where the conversation ended as far as he and I were concerned.

“Question: Then do you know whether or not Mr. Upson came over to your plant shortly after that conversation? Answer: Yes, he did.

“Question: Were you present at that time?

“Answer: Not all of the time. He talked to Ahearn most of the time. I had a crew working.

“Question: You were foreman of the crew on the job, were you not? Answer: Yes, sir.

“Question: Did you have any conversation with Mr. Ahearn relative to pulling this wire after it arrived,—the latex wire?

“Answer: I wouldn't pull it because I thought there was some mix-up in the ordering of it. At the end of about ten days the Navy said, 'Either pull it

(Deposition of Arthur L. Rockwell.)

or get [269] it off the premises.' The morning we set up the reels to pull it, I got called down to the contracting section. Ahearn took the crew over and he pulled the first stretch there in between the first two manholes and got them in wrong and I had to pull it out and do it over again.

"Question: Then, as I understand, he pulled the first wire, in your absence? Answer: Yes.

"Question: And it was pulled wrong, you say?

"Answer: Yes. The wrong lengths were pulled in. I pulled it out. There were various lengths to fit the distances in between the manholes.

"Question: After this wire arrived or after any material arrived, was it necessary to make a report to the Navy Department as to the material on hand?

"Answer: It was.

"Question: Who made out those reports?

"Answer: All we did,—we called the inspector and he would come up and check the material and see whether it would be approved for the job; then he would make a listing of it. He generally wanted the shipping invoice and he would take that and make a list of it.

"Question: Did you make a report to the Navy inspector in connection with this latex?

"Answer: I did, yes. [270]

"Question: Did he come up then?

"Answer: He came up and checked the quantities.

"Question: Is that the man from the Navy who either told you to pull the wire or get it off the job?

(Deposition of Arthur L. Rockwell.)

“Answer: Yes.

“Question: To whom did he make that statement,—to you? Answer: To me, yes.

“Question: Was Mr. Ahearn present?

“Answer: No. I informed Mr. Ahearn of it.

“Question: Mr. Rockwell, I will ask you to state whether or not, before the wire was pulled, an estimate or a document was filed with the Navy in connection with a draw for the latex wire?

“Answer: There was.

“Question: What are those called?

“Answer: They are estimate payments is what they are.

“Question: Estimate payments?

“Answer: Yes. When you set the material on the job, the Navy will pay you all but about ten per cent of the material setting on the job as per your invoice, plus whatever work you have completed during a period of time. Generally, it is figured out on a monthly basis. [271]

“Question: Was such an estimate filed with the Navy in connection with this latex wire?

“Answer: There was, yes.

“Question: Was that before or after the wire was pulled?

“Answer: The estimate was filed before the wire was pulled but I don't believe Ahearn was paid for it prior to the pulling of the wire. But the estimate was filed prior to the pulling of the wire.

“Question: You prepared the estimate, did you?

“Answer: Yes. I sketched it out and then I gave

(Deposition of Arthur L. Rockwell.)

it to him. He would type it out and sign it and give it back to me and I would take it to the Contracting Section.

“Question: By ‘him’ you are referring to Mr. Ahearn? Answer: Yes.

“Question: So he had knowledge of this, did he?

“Answer: Yes.

“Question: Do you recall the amount of money involved in connection with it?

“Answer: As I recall, it was roughly around \$10,000.

“Question: Do you recall what figure was used for the cost of the latex wire? [272]

“Answer: Around \$7,500. They were never very accurate on their estimates,—just so you didn’t go over what you had,—they never questioned one way or the other. Then it was cleaned up at the end of the job.

“Question: Would you state whether or not you ever had any conversation with Mr. Ahearn with reference to the payment of this latex wire?

“Answer: After the wire was pulled, all he told me, he said, ‘I am not going to pay for that latex.’ He said, ‘I have got a boy working for Westinghouse and he will see that I don’t have to.’

“Question: That was after the wire was pulled?

“Answer: That was after the wire was pulled and spliced.

“Question: Was that the first time that he had indicated to you that he did not intend to pay for the latex? Answer: That is right.

(Deposition of Arthur L. Rockwell.)

“Question: As I understand your testimony, you had no knowledge that the latex wire had been ordered until shortly after the first of the year, '53?

“Answer: That is right.

“Question: Mr. Ahearn had never advised you that he ordered it back in February or March, 1952?

“Answer: No, he hadn't. [273]

“Question: Is there any reason or explanation that you might have for him not giving you that information?

“Answer: In September—the latter part of September—when we were splicing the secondary 600-volt wire, I hired some cable splicers on a week end. I told him I was going to splice cable on the week end, and he said that was all right. The labor bill for the splicing of all this wire ran about \$600. Then he sent me a registered letter, drawn up by attorney Wallace stating that I had no authority on the job any more, one way or the other, and that this \$600 would be taken out of my twenty-five per cent.

“Question: On what basis were you employed on the job?

“Answer: As a foreman and to receive twenty-five per cent of the net profit.

“Question: The net profit from that particular job? Answer: That is right.

“Question: Were you ever paid any profit by Mr. Ahearn? Answer: No.

“Question: Did Mr. Ahearn ever give you an accounting of the cost of the job? [274]

(Deposition of Arthur L. Rockwell.)

“Answer: I went out to his house, after he sold his shop, and we went over his books and tried to arrive at the net cost on the job. There were several instances where I found the payroll had been,—men that I had discharged were still kept on the payroll and charged to the Navy Yard job, and I just gave it up when I saw what was happening.

“Question: After they were discharged they were carried on the books?

“Answer: Yes. There were two men that I had discharged, and they went to his shop and drew time from his shop and he charged them to the Navy Yard job.

“Question: They worked at his shop rather than at the Navy Yard? Answer: Yes. [275]

* * *

“Question: Would you say that he kept very good books and records in connection with this job, Mr. Rockwell?

“Answer: No, I wouldn't. They were very poor books. Just with what small sketches I had on the job and the various amount of materials that were used, I showed a profit on the job. When he told me that there wasn't any profit on the job, why, I was quite astounded. The only thing that he offered to offset that was the large labor bill.

“Question: I didn't understand your last answer, Mr Rockwell, where you said large labor.

“Answer: Mr. Ahearn discharged these men. These men were discharged and Mr. Ahearn was showing an excess of time—more than they worked

(Deposition of Arthur L. Rockwell.)

on the job. I didn't want to make a fuss about it. I just let the thing go. [276]

* * *

"Cross-Examination

"By Mr. Hoof:

"Question: Will you give me the names of the two men that you mentioned whom you had discharged?

"Answer: I don't remember them right offhand. If I had the time books I could——

"Question: Do you remember their nicknames or anything that would describe them?

"Answer: As I remember, one of them was Jack. I don't remember what his last name was. I know the reason I discharged him, and I know that he worked for Ahearn for a month or so after that.

"Question: Could you give me the approximate date of his discharge? Answer: No.

"Question: You can't give that?

"Answer: No.

"Question: Do you have any way to describe his physical characteristics?

"Answer: Any way to describe his what?

"Question: His physical characteristics so he might be identified.

"Answer: He was a darned poor [279] electrician.

"Question: No. I am speaking about physical identification.

"Answer: I don't know. I couldn't remember.

(Deposition of Arthur L. Rockwell.)

Roughly, I went through about thirty or forty men on the job.

“Question: Can you tell me when Jack approximately went on the job,—this person whom you referred to as Jack? Answer: No, I couldn’t.

“Question: Do you have any identification of the other man at all; are you able to describe him to me?

“Answer: Of the other men?

“Question: The other man. There were two men that you said you had in mind in particular.

“Answer: No. The only reason I referred to that was why I never collected my twenty-five per cent.

“Question: I understand that. But can you describe the other man to me?

“Answer: The reason I noticed it, when I was checking over this labor bill, there were payrolls made out at all times, was that each one of these men,—they only worked on the job for about a week prior to my discharging them. Then it would show up as four or five weeks on Ahearn’s payroll.

“Question: I am going to hand you what has been [280] marked as Exhibit 20, Mr. Rockwell.”

Mr. Hoof: May it please the Court, that is the second sheet of the two sheets that were previously hooked together as Exhibit 20, and I wonder if we could have that identified as possibly Exhibit 20(a)?

The Court: Do you wish the Clerk to put 20(a) on the second page?

Mr. Hoof: Yes, and we will then so mark the deposition, because there was but one sheet handed to the witness at that time.

(Deposition of Arthur L. Rockwell.)

The Court: Is that agreeable, Mr. Lane?

Mr. Lane: Yes, your Honor.

The Court: Let the second portion of that exhibit previously marked Plaintiff's Exhibit 20 be marked 20(a).

(Letter dated January 26, 1953, being a part of Plaintiff's Exhibit No. 20, is further marked Plaintiff's Exhibit No. 20(a) for identification.)

"Question (Continued): Have you ever seen that document before? I want you to read it.

"(The witness peruses the document.)

"Answer: This letter was written—— [281]

"Question: Will you answer the question?

"Answer: What was it?

"Question: Have you ever seen it before?

"Answer: I saw it in the making but I never saw the finished product of it.

"Question: By in the making what do you mean—in the Navy Yard?

"Answer: In the Contract Section of the Navy Yard, yes.

"Question: You are using the date of the letter to refresh your memory,——

"Answer: I was.

"Question: No. I say I want you to use the date to refresh your memory.

"Answer: January 26th.

"Question: That letter is dated January 26th; now, the actual pulling of the wire did not start until after January 26th?

(Deposition of Arthur L. Rockwell.)

“Answer: Roughly around that time as I remember. The wire arrived the first week in January and it set there for a couple of weeks before it was ever touched. It never was touched until this letter was sent to Ahearn. Because I stated previous to this that I had furnished a breakdown of paper and lead to the Navy, and that is the reason for this letter. [282] Whenever you change any material one way or the other they have to check that even though it was in their general specifications prior to that.

“Question: I am now referring to the next to the last paragraph on page 2.

“Your attention is invited to Section 1.07 of Specification No. 30338 which states “Damage for delay in accordance with Article 11 of Form No. 197 shall be at the rate of \$40.00 per calendar day.” The contract completion date was 28 October, 1952, and it is useless to say that the work to date is not completed, which leaves the Officer-in-Charge of Construction no other alternative than to either charge liquidated damages or by supporting documents provided by your company to consider a time extension. It is appreciated, due to delays in delivery of some of the material, that the completion date of the contract was delayed and consideration will be given to a time extension for only this delayed material which is now actually at the job site. The Officer-in-Charge of Construction also at this time wants to make very clear that definitely no consideration will be given for a time extension for reordering any of the material now at the job site required under the sub-

(Deposition of Arthur L. Rockwell.)

ject contract. [283]

“ ‘In conclusion, you are requested to take the necessary action to install the specified materials and complete the work under the subject contract at the earliest possible date.’

“In other words, the Navy—in substance by this the Navy said, ‘Mr. Rockwell you do have on the site material which will comply with the specifications’?

“Answer: That is right.

“Question: Therefore you are required to proceed with installation of the material at this time or we will proceed to charge you \$40 a day penalty, that is right, isn’t it? Answer: Yes.

“Question: Therefore this material was used?

“Answer: It was on the job site.

“Question: I appreciate it was on the job site. But it was after this letter that the wire was actually pulled and put into its proper places?

“Answer: That is right.” [284]

* * *

JOHN V. AHEARN, SR.

called as a witness by and on behalf of himself having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hoof:

Q. Will you state your name, please?

A. John V. Ahearn, Sr.

Q. And Mr. Ahearn, you are the defendant in this action or one of the defendants, I should say?

A. Yes, sir.

(Testimony of John V. Ahearn, Sr.)

Q. Mr. Ahearn, the contract that has been referred to here, which has been admitted into evidence as Exhibit 18, was performed by the Ahearn Electric Company, was it not? A. Yes, sir.

Q. And, Mr. Ahearn, you were the sole proprietor, were you not, of the Ahearn Electric Company during all times material to this litigation?

A. At the time, yes, sir.

Q. Now, Mr. Ahearn, with reference to [289] your residence, where do you now live?

A. At Route 6, Box 3172, Bremerton. That is five miles out from Bremerton.

* * *

Q. At what period of time, Mr. Ahearn, did you move to the rural route address that you have now stated?

A. The latter part—around September—October—of 1951. [290]

* * *

Q. During the period of time from the commencement of this contract to the conclusion, was the house rented to others? A. Yes, sir.

Q. That is the one adjacent to the shop?

A. Yes, sir. [291]

Q. Mr. Ahearn, handing you what has been marked for identification as Defendant's Exhibit No.—

Mr. Hoof: Mr. Clerk, what is that number?

The Clerk: A-3.

(Specifications Contract marked Defendant's Exhibit No. A-3 for identification.)

(Testimony of John V. Ahearn, Sr.)

Q. (Continued): Will you please state to me sir, what that is, if you know?

A. This is specifications on this Navy Yard job.

Q. Now, that is the contract?

A. The contract, yes.

Q. The contract out of which this litigation arises, at least the furnishing of the materials?

A. That is right.

Mr. Hoof: I should like to offer Defendant's Exhibit A-3.

Mr. Lane: I have no objection, your Honor.

The Court: Defendant's Exhibit A-3 is now admitted. [292]

* * *

Q. Now, Mr. Ahearn, where did you obtain Plaintiff's Exhibit 3, being the quotation from the Westinghouse Company relative to prices for your bid?

A. I received it from Mr. Upson.

Q. And when did you receive it?

A. The bid opened February 1. I mean—yes, I had to be over in Seattle February 1, at 2:00 o'clock, and I had to have this specification on the prices there the day before.

Q. And how did you receive the quotation on prices?

A. They brought it over.

Q. Now when you say "they" who?

A. Mr. Upson brought it over.

Q. To you personally?

A. To me personally.

Q. And did you then, Mr. Ahearn, have any discussion with Mr. Upson relative to the quotations?

(Testimony of John V. Ahearn, Sr.)

A. Yes. He had all the prices for me to bid [294] on. I couldn't bid without having these prices, and that is how I have to arrive at my figure, which is fifty-one thousand, something like that. I had to get all these quotations and the breakdowns that I had, and I had to get this cable and transformer and boxes from them.

Q. Yes, sir. Now where did the discussion with Mr. Upson take place?

A. At 926-Sixth Street.

Q. In Bremerton? A. In Bremerton.

Q. And on what day, sir?

A. It was during the week.

Q. Well, what I am getting at, and I ask you to refer to the date of the quotation—

A. Well, on the last—day of this—31—I had to have this to be able to put in my bid, so he was there that day, the day before the bid was opened, which is on January 31.

Q. And the bid opening was February 1?

A. The bid was February 1, 1952, yes.

Q. Now, did you spend any time going over the various materials shown on Exhibit 3, the price quotation of Westinghouse, with Mr. Upson?

A. Yes, sir.

Q. And did you, sir, discuss the matter of [295] telephone cable? A. Yes, sir.

Q. Now, would you kindly refer to the third page of Exhibit No. 3, being the quotation, and I think you will note the following language is used with

(Testimony of John V. Ahearn, Sr.)

reference to paper wrapped lead wire. Do you find the item now that I am speaking of?

A. Yes, sir.

Q. (Reading): "Shipment—Telephone Cable—Third Quarter 1953." A. Yes, sir.

Q. (Reading): "Prices billed will be those in effect at time of shipment." "Orders on Telephone Cable should be placed direct with Graybar Electric Company, Seattle." A. Yes, sir.

Q. Do you find that? A. Yes, sir.

Q. Have I read it correctly? A. Correctly.

Q. Now, at that time, did you discuss the matter of the cable and the matter of ordering with Graybar and other matters in connection with it with Mr. Upson? A. I did, sir.

Q. Will you tell me what conversation you [296] had with Mr. Upson and who else, if anyone, were present?

A. I know my wife was present for one, and I was present. Rockwell was present. I think also Mr. Blackman was present.

Q. Now, what discussion was had with reference, that is by you, with Mr. Upson, with reference to the matter of the paper-covered lead-sheathed wire as to where the order should be placed and as to delivery dates?

A. I looked on this where it says "Orders for Telephone Cable should be placed direct with Graybar" and I mentioned to Mr. Upson at that time—I said: "I should get in touch with Graybar on this because it specifies on that—." And he said: "Never

(Testimony of John V. Ahearn, Sr.)

mind that." He says: "I will put it in one account, this Navy Yard account." And give me ninety days to be able to pay for it after I receive it from the Government, you know, and I says: "Well, it says from Graybar." Well, he said: "I can get it." And I said: "How can you get it? I should go to Graybar." He said: "No. Give it to us and we will have it all on one order." And I said: "You can't furnish it." And he said: "Yes." And I said: "Can you furnish it in this time specified in this specification? It states that the contract must be finished in August."

Q. Of what year, sir? [297]

A. Of 1952. So I took exception to this here on Graybar, and I wanted to give it to Graybar.

Q. What did Mr. Upson tell you with reference to his being able to secure the wire within time to complete the contract in August of 1952?

A. Well, I said: "Can you get it?" And he said: "Yes." "Can you get it on time so I can complete my contract?" And he said: "Yes."

Q. Now, as a result of that conversation, did you make a bid? A. I did, sir.

Q. And what kind of wire did you bid?

A. I bid on the telephone cable paper wrapped at these prices that was quoted here.

Q. And, Mr. Ahearn, where was the bid depository? In other words, where were the bids to be sent or delivered?

A. Oh, the early morning——

Q. No.

(Testimony of John V. Ahearn, Sr.)

A. At six o'clock I had to catch a boat to Seattle.

Q. No, sir. Please answer the question.

A. At Seattle.

Q. At Seattle? A. Pier 99. [298]

Q. All right, sir. How did you get your bid there? A. Delivered in person.

Q. On what date? A. On February 1.

Q. And then, Mr. Ahearn, did you remain for the bid opening? A. I did, sir.

Q. And was the bid opening at 2:00 o'clock, February 1 of 1952? A. It was, sir.

Q. Were you the successful bidder?

A. I was the successful bidder.

Mr. Hoof: For convenience, I wonder if I might have the Exhibits. I think it would be of some assistance.

(All Exhibits are handed to Mr. Hoof.)

Q. (By Mr. Hoof): I am now handing you what is marked as Plaintiff's Exhibit No. 5, which is a carbon copy of the Westinghouse Electric Supply Company's list of materials dated February 5, 1952, Mr. Ahearn. A. I have it, sir.

Q. You have examined it now, Mr. Ahearn?

A. Yes, sir. [299]

Q. And the testimony has been that that was written up on or about February 5, 1952?

A. Yes, sir.

Q. (By Mr. Upson): Do you so testify yourself? A. I do, sir.

Q. And that Exhibit No. 5, the order for materials on the job from Westinghouse Supply Com-

(Testimony of John V. Ahearn, Sr.)

pany, calls for what kind of cable with reference to the telephone cable?

A. It calls for paper-wrapped lead cable, Western Electric type.

Q. Now, did you or Mr. Rockwell at or about that time notify the Navy Department of the material that you were to use?

A. Yes, sir. We had to make a breakdown, specifying each item, the amount of the item, the amount of installing, digging, transformer, cable, everything. There are quite a number of articles, and we had to submit that to the Government.

Q. What type of wire was specified in your breakdown?

A. Paper wrapped, Western Electric wire.

Q. Now, do you recall a gentleman by the name of Blackman being in your employ?

A. Yes, sir. [300]

Q. Do you recall approximately when he commenced work for your company?

A. Somewhere in the year 1950.

Q. And about how long did he remain in your employ?

A. Until October of 1952, when I sold out.

* * *

Q. Did he work on the Navy Yard job, Mr. [301] Blackman?

A. He worked on the Navy Yard job, yes.

Q. And Mr. Ahearn, was there a time book kept in connection with his work? A. Yes, sir.

(Testimony of John V. Ahearn, Sr.)

Q. I hand you what has been marked as Defendant's Exhibit No. A-2, which has previously been admitted into evidence, and I will ask you to examine that book and tell me what it is please?

A. (Examining Exhibit): Each mechanic that I have on the job has a book in the shop.

Q. Yes, sir, and will you tell me what that specific book is, if you will, please?

A. It is a time book. They mark their time down.

Q. And that is the time book of whom?

A. Of Mr. Blackman.

Q. Now, will you kindly find, if you will, please, the page in the book covering the month of March, 1952?

A. Yes, sir.

Q. Do you have that before you?

A. I have it.

Q. Now, that discloses for the day of March 10, what? What does that show with reference to the date of March 10? [302]

A. It shows eight hours in the Navy Yard.

Q. For whom? A. For Mr. Blackman.

Q. Now, with reference to the eight hours in the Navy Yard, are you able to tell me whether or not any Naval job work was at any time done by Mr. Blackman or by anyone else, insofar as the performance of the contract is concerned, in your shop?

A. None whatsoever.

Q. Was your shop at any time used for performing any of the Naval Yard job work?

A. None whatsoever.

(Testimony of John V. Ahearn, Sr.)

Q. Where was the performance on the Naval job of the work that was required to be done on the job actually done? A. In the Navy Yard.

Q. And are you able to state from an examination of that book and from your knowledge of the work that went on where Mr. Blackman was during the working day of March 10 of 1952?

Mr. Lane: If your Honor please, I will object to that question unless the witness specifically remembers. He is testifying from the book, and what the book shows is one thing.

The Court: Put the book down. [303]

Read the question.

(The last question is read by the reporter.)

The Court: Do you know where he was?

The Witness: Yes, sir. I have records, Government records, given to the Government, sworn to, affidavits, that the man was working in the Navy Yard. The Government has got the records. [304]

* * *

Q. Now, I am going to confine my questions, Mr. Ahearn, to the 10th day of March, 1952, and so, with reference to my questions, will you kindly confine your answers to that particular date? On March 10 of 1952, did you see at Bremerton, Washington, at your place of business, Mr. Upson of the Westinghouse Company and Mr. Novich of the Westinghouse Company or both of them?

The Court: Read the question.

(Testimony of John V. Ahearn, Sr.)

(The last question is read by the reporter.)

Mr. Lane: It is a leading question, your Honor, but I have no objection.

The Court: The objection is overruled, and I direct the witness to answer yes or no. [311]

A. Yes.

Q. (By Mr. Hoof): And which of the gentlemen did you see or did you see both of them, will you kindly answer that? A. Both of them.

Q. Now, will you tell me, sir, about what time of the day that was?

A. I live five miles out of town. I drove into town so I would imagine it would be around 9:00 o'clock, something like that, maybe between 9:00 and 10:00.

Q. That would be at what time of the day, morning or night? A. In the morning.

Q. Were Mr. Novich and Mr. Upson together?

A. Yes, they was together.

Q. Do you know, sir, what the purpose of Mr. Novich's trip to Bremerton was? A. Yes, sir.

Q. Will you state that purpose?

A. Mr. Pruitt of the Thrift Market, No. 1, in Bremerton, asked me to give a bid on changing the lighting at Fifth and Park and I asked Mr. Upson if he would have a lighting engineer come over and help me out and figure out on the lighting of that store.

Q. And will you state, Mr. Ahearn, what [312]

(Testimony of John V. Ahearn, Sr.)

the lighting consisted of that was to be done or bid upon?

A. The bid that I put in was on fluorescent lighting. It had incandescent lights in. The specified amount I don't know. I imagine it was around at least thirty fluorescent lights. The bid was something around——

Q. I did not ask you the amount of the bid, but I was trying to find out what type of lighting fixtures. A. Fluorescent.

Q. And how many of them, sir?

A. I would judge around thirty.

Q. Now, your testimony was that the lighting at that time was incandescent? A. Yes, sir.

Q. Did you do anything about Mr. Novich seeing the lighting job? In other words, did he see the store? A. Yes, sir.

Q. What did you do in that respect?

A. We went over there and we checked.

Q. Now, when you say "we," whom do you mean? A. Mr. Novich and myself.

Q. Where did you go?

A. To Fifth and Park, to the Thrift Market No. 1. [313]

Q. And what occurred there, sir?

A. We checked to see how many lights they would need or the amount—what they really needed for the store.

Q. And was such a computation made? I say, was such a computation made as to lighting?

A. Yes.

(Testimony of John V. Ahearn, Sr.)

Q. Then, at that time, sir, was Mr. Upson with you and Mr. Novich? A. No, he was not.

Q. Then, where did you and Mr. Novich go?

A. I went back to the shop.

Q. Who accompanied you, if anyone?

A. Mr. Novich.

Q. And what occurred in the shop?

A. Well, he gave me the figures on the amount of the lights, how much they would come to.

Q. And having determined that, what did you then do yourself?

A. I figured the cost of the lights. I figured the cost of the fixtures, figured the cost of labor, and then I went back to the store, to Mr. Pruitt, and I gave him a bid on the amount of the lighting it would cost him to put it in.

Q. Now, sir, on the 10th day of March, [314] 1952, and continuously from that point to this date, can you state whether or not the incandescent lamps have ever been replaced in the Thriftway Market?

A. No. They have never been replaced.

Q. Was your bid accepted or rejected?

A. It wasn't either accepted—or—well, it would have been rejected but it wasn't accepted.

Q. Now, either it was accepted or rejected.

A. It was never accepted yet.

Q. It has never been accepted?

A. It has never been finished.

Q. And your statement is that there has been no change in the lighting since March 10 in the Thrift Market? A. No change.

(Testimony of John V. Ahearn, Sr.)

Q. And was there any change immediately prior to that date? A. No change. [315]

* * *

The Court: Did you talk to them about anything relating to this contract that is the subject matter of this suit?

The Witness: No, sir.

* * *

Q. Now, with reference to Mr. Upson, you stated that he and Mr. Novich came to your office or your place of business in the morning. Now, what happened insofar as Mr. Upson was concerned as to where he went or what he did, do you know, during that day?

A. Well, he has other places to call on, other people to call on, so he went to call on the other people. [316]

Q. Now, what kind of a headquarters, if any, did Mr. Upson have in Bremerton?

A. Well, he didn't have no headquarters at all, but he used to come to my place first whenever he would come in, and he would use the telephone, call up different places, and a lot of people at different times would call up and ask if Mr. Upson was there.

Q. Now, in the morning of March 10, 1952, when Mr. Novich and Mr. Upson were present in your office, and prior to the examination of the Thrift store for lighting fixtures, who were present at that time?

A. My wife was present. She came in with me

(Testimony of John V. Ahearn, Sr.)

from the country. She is the bookkeeper. Harry Adams, he was the one that opened up the store. Us three was there. Then Mr. Upson and Mr. Novich came in later.

Q. Now, was there anyone else present, sir?

A. None.

Q. Was Mr. Rockwell present at that time?

A. I couldn't say whether Mr. Rockwell was present or not. He could have been because he comes in and he was supposed to be in the Navy Yard at 8:00 o'clock.

Q. Now, in the morning when Mr. Novich and Mr. Upson were there, yourself, Mrs. Ahearn, Mr. Adams that you have testified to, and possibly Mr. Rockwell, which [317] you do not recollect whether he was present or not, was any discussion had whatsoever on the part of Mr. Rockwell with Mr. Upson in your presence or was any discussion had by you with Mr. Upson relative to a change in the type of wire, that is to say, from the paper-covered wire to the latex-covered wire?

A. None whatsoever. [318]

* * *

Q. Did Mr. Upson discuss with you any lighting fixtures?

A. All I remember is that Mr. Upson came in there and said to me: "This is Mr. Novich. I brought him over on that lighting job." Then we went out on that job. There was no discussion made because I was with Mr. Novich. I spent about an

(Testimony of John V. Ahearn, Sr.)

hour and a half at least at the Thrift Market figuring out the lighting.

Q. Now, I am going to hand you what has been introduced into evidence as Defendant's Exhibit No. A-1, which has to do with an invoice from Westinghouse in connection with certain ruby fixtures. The typed order is dated the 11th day of March, 1952. The penciled attachments, I believe, are dated the 10th day of March, 1952. Now, can you tell me about that exhibit as to the fixtures and what purpose the fixtures were for?

A. Not to go through my records there, but on these ruby fixtures, that was for a private individual, these four ruby fixtures.

Q. And can you tell about that particular order that was placed through your company, for whose benefit [319] was it?

A. Mr. Upson asked me to get these ruby fixtures for this gentleman. I think he run some kind of a store in or around Bremerton. He wanted to buy them for him at a certain discount.

Q. Less than the price you would charge for them?

A. That is right.

Q. Did you accommodate Mr. Upson?

A. I did, and the man came a day or two later, and he picked them up and paid for them.

Q. Mr. Ahearn, when, if at any time, did you first learn about the price of latex-covered wire?

A. December 30, 1952.

Mr. Lane: What date was that?

Mr. Hoof: He said about December 30, 1952.

(Testimony of John V. Ahearn, Sr.)

The Witness: Or '53, from the invoice.

Q. (By Mr. Hoof): Now, that was an invoice from whom? A. From Westinghouse.

Q. I hand you what has been introduced in evidence as Plaintiff's Exhibit No. 16 and ask you if that is the invoice to which you are referring?

A. Yes, correct.

Q. Now, sir, at any time prior to that date [320] had you ever discussed with any representative, and particularly Mr. Upson of the Westinghouse Company, any change in the order of the wire which was originally ordered, that is to say, paper to latex?

A. No, I never discussed it with anybody.

Q. Did he, sir, ever discuss it with you?

The Court: I did not hear the answer.

A. No, sir.

Q. When was the invoice, which you have in your hand, dated—I believe December 30, 1952, received by you?

A. December 30 is when it was mailed. I received it about the next day, I guess. It takes about a day to come over.

Q. Well, in any event, when did you next have any contact with the Westinghouse Supply Company? A. When I received this.

The Court: What is this?

The Witness: When I received this invoice.

The Court: Does it have a number?

The Witness: No. 16.

Mr. Hoof: It is Plaintiff's Exhibit No. 16.

(Testimony of John V. Ahearn, Sr.)

A. When I received this invoice I figured [321] that it would be for \$1,800, the price, around \$1,800 there, the price that I figured in the first place for the paper-wrapped wire, and I seen it was \$7,646.29 and I said: "What the dickens? What happened here?" I got on the phone immediately there and called up the foreman, Mr. Rockwell. He was in the Navy Yard. And I told him he had better come out here and I read this to him over the phone and he came out right away.

The Court: Who is that?

The Witness: Mr. Rockwell, the foreman, and he came in the door and I showed him this. I said: "Rocky, did you order this?" He said: "No." Then I said: "How come this is this way?" He said: "Well, I will find out about that." And he got on the phone and he put in a long distance phone call to Mr. Flechsig. My wife was there, and my son was there, the young son who was in this courtroom the last two days, and he heard everything they said, and he said he never ordered it and he said: "What are you trying to pull off on that?" He was pretty mad about it.

Mr. Lane: Who was mad? I don't understand.

The Witness: Mr. Rockwell was.

Q. (By Mr. Hoof): Now, subsequent to that telephone call, what [322] further contact, if any, did you have with the Westinghouse Electric Supply Company, that is, after that telephone call?

A. I got in touch with Mr. Upson there.

Q. You got in touch with Mr. Upson?

A. Yes.

(Testimony of John V. Ahearn, Sr.)

Q. And how was that, please?

A. Well, he usually comes over. I call him up, but he usually comes over about three times a week. Whether he came over from my telephone or not—but I got in touch with him. No, he came over because he said—he——

Q. Now, just a minute. Before you say what was said, will you fix the approximate date of it, please, with reference to the call made by Mr. Rockwell?

A. I don't know just exactly what date it was. It was after I received this invoice and after we talked to Mr. Flechsig, after I received this and talked to Mr. Flechsig. It was that same week.

Q. Would that be in December or January?

A. I am pretty sure that it was—I think it was in December there. It was right after this.

Q. Would it be possible it would be the early part of January?

A. It could. It could have been in January. [323] It was the holidays then.

Q. And where did you see Mr. Upson?

A. He came over to the place of business.

Q. And what conversation was had between you and Mr. Upson at your place of business and who were present, please?

The Court: What was the date? What year, please?

The Witness: 1953.

Q. (By Mr. Hoof): By the way, who was pres-

(Testimony of John V. Ahearn, Sr.)

ent at that time when Mr. Upson came in response either to the call or his regular call, in any event? You were present, sir? A. I was present, yes.

Q. Mr. Upson was present? A. Yes.

Mr. Lane: Let the witness testify.

The Court: Objection sustained. If you can recall, say so, and if you cannot, kindly indicate and let us go on.

The Witness: I can't recall, sir.

Q. (By Mr. Hoof): Now, what conversation was had at that time with Mr. Upson relative to the wire?

A. Well, he says, he didn't say anything [324] about me ordering. That is one thing. I said: "There is an awful mistake."

The Court: That is not an answer to the question at all.

Q. (By Mr. Hoof): I want the conversation, please.

The Court: If you can recall it.

A. He said there: "We will try to straighten this out." He also said we ought to go to the Government, over to Pier 99 in Seattle, and maybe get an increased price on this wire. He said: "I will go over there with you."

The Court: Mr. Hoof, I assume you understand that the Court wants to know what was said regarding the change in the order of this cable, if anything was said, and I am really not too much concerned about what either one of them said about

(Testimony of John V. Ahearn, Sr.)

what else they might do after they found themselves in this trouble.

Mr. Hoof: I am aware of that, your Honor, and I am attempting to elicit that.

The Court: You may proceed.

Q. (By Mr. Hoof): Mr. Ahearn, what was said to you to Mr. Upson at that time with relation to the latex wire, and what [325] was said by Mr. Upson to you relative to the latex wire? I want you to confine yourself to that particular proposition, relative to ordering it or otherwise.

A. He didn't say anything.

Q. No, sir, but what did you say about ordering the wire? A. I said I didn't order that wire.

Q. And what did he say?

A. I guess he must have said: "I guess you did."

Q. What? A. He said I did.

Q. He claimed you did? A. Yes.

Q. And what did you say?

A. I said I did not.

Q. And then what happened?

A. Well, I said: "I won't accept it."

Q. You what? A. "I won't accept it."

Q. And what did he say?

A. He didn't have no answer to that. [326]

* * *

Q. (By Mr. Hoof): Mr. Ahearn, what was the original completion date on the contract here involved? A. August, 1952.

(Testimony of John V. Ahearn, Sr.)

Q. And Mr. Ahearn, the contract was finally completed when, approximately?

A. February.

Q. Of what year, sir?

A. 1953, around the 20th, I believe.

Q. Now, subsequent to the meeting with Mr. Upson, I will ask you, sir, whether or not you had any meeting with Mr. Flechsig and Mr. Upson? Mr. Flechsig is the witness who testified as the supervisor of Mr. Upson? A. Yes.

Q. Now, can you tell me approximately when that was and where it took place?

A. It took place out at my residence, out in Route 2, Box 3172, Bremerton. [327]

* * *

Q. I am handing you what has been marked, Mr. Ahearn, as Defendant's Exhibit No. A-5 for identification. Will you tell me what that is, please, if you know? A. It is A-5.

The Court: And what kind of a thing is it, if you know?

The Witness: It is discussing about latex cable.

Mr. Hoof: No. [331]

Q. (By Mr. Hoof): Let me phrase it for you for identification, please. Is that a letter from the Westinghouse Supply Company?

A. Yes, sir.

Q. And what is the date of the letter?

A. March 10, 1953.

Q. And it is addressed to you?

(Testimony of John V. Ahearn, Sr.)

A. To me, yes.

Q. At what address, please?

A. Route 6, Box 3172, Bremerton, Washington.

Q. And it is signed by whom?

A. Mr. Flechsig.

Q. Now, you received that, Mr. Ahearn, from Westinghouse?

A. I did, sir.

Q. And about when?

A. About March 11.

Q. Now, with reference to the two attachments to the letter, the first attachment, Mr. Ahearn—

The Court: Why do you not ask him, and then there will be no objection to that. If you will just ask him, Mr. Hoof—

Mr. Hoof: Yes, your Honor. [332]

Q. (By Mr. Hoof): Will you examine the first attachment to the letter, Mr. Ahearn?

A. (Examining Defendant's Exhibit No. A-5.) You mean in the back?

Q. The first attachment to the letter.

A. Yes.

Q. Now, will you state what that is, please?

A. It is the price of latex wire.

Q. And that is from whom? Can you tell me from the top?

A. United States Rubber Company.

Q. And addressed to whom?

A. Westinghouse Electric Supply.

Q. And that covers latex wire?

A. Yes, sir.

Q. Now, what date does that copy purport to bear?

A. It is February 18, 1952.

(Testimony of John V. Ahearn, Sr.)

Q. Yes, sir. Now, will you kindly look at the second attachment to the letter? A. Yes, sir.

Q. Now, what is that?

A. That is the amount of the latex wire.

Q. And what letterhead does it bear?

A. Westinghouse Supply Company. [333]

Q. To whom?

A. To Ahearn Electric Company, 826 Sixth Street, Bremerton, Washington.

Q. Now, Mr. Ahearn, I will ask you whether or not, prior to the 10th day of March, 1953, you ever received from the Westinghouse people copies of those documents that are attached to that letter or any documents resembling the same?

A. No, I did not.

The Court: I will be interested to know if any part of this Exhibit is in the nature of an invoice. I wish you would have the witness explain on proper interrogation what the difference is between the Exhibit and Plaintiff's Exhibit No. 16.

Mr. Lane: If your Honor please, I might state that the two attachments to this letter that counsel referred to are already in evidence as Exhibits.

The Court: What numbers?

Mr. Lane: One of them is Exhibit 7. That is the quotation from the United States Rubber Company and the other is Exhibit 11, I believe, which has not been admitted.

The Court: Plaintiff's Exhibit 11, rejected, is a typewritten copy of Exhibit 10 which is [334] admitted.

(Testimony of John V. Ahearn, Sr.)

Mr. Lane: Yes, your Honor.

Mr. Hoof: That is correct.

The Court: Do you wish to have——

Mr. Hoof: I will stipulate that they are the same.

The Court: Do you have any objection to the admission in evidence——

Mr. Lane: No, your Honor.

The Court: Then do you offer A-5?

Mr. Hoof: Yes, your Honor.

The Court: A-5 is now admitted.

* * *

Q. I now hand you Plaintiff's Exhibit 5, which has been admitted into evidence——

The Court: You mean Defendant's Exhibit No. A-5 or Plaintiff's Exhibit No. 5?

Mr. Hoof: Plaintiff's Exhibit 5, your [335] Honor.

Q. (By Mr. Hoof): ——which has been admitted into evidence, and which is a carbon copy of the Westinghouse Supply Company order form, which Mr. Upson has testified was prepared by him. Now, does that, Mr. Ahearn, have any reference to latex cable? A. No, sir.

Q. Handing you what you introduced in evidence as Plaintiff's Exhibit No. 7, being a quotation from United States Rubber Company to the Westinghouse Electric Supply Company, dated February 18 of 1952, I will ask you, sir, if that is not the same as a copy of the attachment to the letter

(Testimony of John V. Ahearn, Sr.)

from Westinghouse Supply Company to you, dated March 10 of 1953?

The Court: Read the question.

(The last question is read by the reporter.)

Q. (Continuing): —the latter having been referred to being marked as Defendant's Exhibit No. A-5? A. Yes, sir. It is exact.

Q. Your answer was yes? A. Yes, sir.

Q. And on or about February 18 or thereafter until the 10th day of March of 1953, sir, did you ever receive a copy of that? [336]

A. No, sir.

* * *

Q. (By Mr. Hoof): In the spring of 1953, Mr. Ahearn, was any meeting held between yourself and Mr. Flechsig and Mr. Upson? A. Yes, sir.

Q. Can you tell me approximately when that was?

A. Somewhere in March. I don't know the exact date.

Q. And what year? A. 1953.

Q. And where did that take place?

A. At my residence, Route 6, Box 3172.

Q. What conversation was held between you and [337] Mr. Flechsig and Mr. Upson or between either of them and you with reference to the latex wire?

A. Well, I stated to Mr. Flechsig that I never ordered that, and he said: "You have a copy of this." I says: "I have not, never received a copy."

(Testimony of John V. Ahearn, Sr.)

So I took him to my files and I let Mr. Flechsig and Mr. Upson go through the files, all through the files. They were there nearly all day.

Q. Did they have dinner with you?

A. Yes.

The Court: What day was that that they went through your files at your invitation, as you just last stated?

The Witness: I can't state the date, sir.

The Court: What month? What year?

The Witness: In March, 1953.

The Court: You may inquire.

Q. (By Mr. Hoof): Now, was there any record found, sir? A. None whatsoever.

Q. Previously we have referred to Mr. Adams. Can you tell me whether Mr. Adams is now living or dead? A. He is dead.

Q. And can you tell me approximately when he died? [338]

A. Last—I think it was last year, the end of the year, something like that.

Q. Would the payroll records of your company show his employment? A. Yes, sir.

Q. Mr. Ahearn, in the deposition or testimony of Mr. Blackman there was testimony that the oven of an electric range was used in part as a file, as a filing cabinet. Will you explain that to me, [339] please?

* * *

A. That was all, just at night. Can I explain?

(Testimony of John V. Ahearn, Sr.)

The Court: Did you use the oven of the stove for utility purposes?

The Witness: No, sir.

Q. (By Mr. Hoof): That was a new range?

A. Can I explain?

The Court: Yes.

A. Next door there is a fire hazard in the house, and the house, you don't know whether it is going to burn down or not. It is terrible. We fought about that for years, and we are always scared about having a fire over there. These records are important, so I put them in the range at night.

The Court: What was the range doing in your office?

The Witness: I was an electrical contractor, sir, and I sell electric ranges, and this was display.

The Court: Was a sample? [340]

The Witness: Sample, yes, sir.

The Court: You may inquire.

Q. (By Mr. Hoof): To shorten the matter up, Mr. Ahearn, in that respect, the oven of an electric range is insulated, is it not? A. Yes, sir.

Q. And that was the reason you used it at night?

A. Yes, sir.

Q. Now, I am going to hand you, Mr. Ahearn, an Exhibit which is marked Plaintiff's Exhibit No. 20, which has been admitted into evidence. The first attachment being a letter from the Ahearn Electric Company to the Officer in Charge of Construction, 13th Naval District, dated January 8, 1953, and in reply, a letter from the District Public Works

(Testimony of John V. Ahearn, Sr.)

Office, 13th Naval District, dated January 26, 1953, to Ahearn Electric Company. The entire Exhibit is Plaintiff's Exhibit No. 20. Now, the first attachment to the Exhibit, Mr. Ahearn——

A. (After examining the Exhibit.) Yes, sir. I have read the first attachment.

Q. That is a letter from yourself to the Navy Department? A. Yes, sir. [341]

Q. That letter, as I read it, was written subsequent to the time that the latex cable arrived on the job? A. Yes, sir.

Q. Then the letter dated January 26, 1953, a part of Exhibit 20, being the second attachment, from the Navy Department to yourself, is in reply to your letter, is it not? A. Yes, sir.

Q. And, Mr. Ahearn, if you will examine the Navy Department letter, you will find in part that the letter says, in substance, that the latex wire conforms to the specifications?

A. Yes, sir. [342]

* * *

Q. I now refer you, Mr. Ahearn to [343] Plaintiff's No. 20, being your letter to the Navy Department that we have just referred to. Now, transmitted with your letter was what?

A. Transmitted with the letter?

Q. Yes. What did you send with your letter?

A. Oh, I sent the copy of Westinghouse sheet that they sent to me which I——

The Court: What was it? What was the nature of the information it contained?

(Testimony of John V. Ahearn, Sr.)

The Witness: Stating——

The Court: Was it a statement of your account on the basis of latex ordered or what was it?

The Witness: Stating——

Q. (By Mr. Hoof): I now hand you Plaintiff's Exhibit No. 16, being the billing from Westinghouse Electric Supply Company to you for latex wire, dated December 30, 1952.

The Witness (Continuing): ——stating the amount and the price of the latex wire.

Q. (By Mr. Hoof): Sir, did you or did you not send a copy of that billing to the Navy? [344]

A. I did, sir.

The Court: In your question, were you referring to Plaintiff's Exhibit 16?

Mr. Hoof: Plaintiff's Exhibit 16.

The Court: Let the record show that.

Q. (By Mr. Hoof): Was anything else included in your letter?

A. No, sir; just this one piece.

Q. Now, if you will refer, sir, to the letter of the Navy Department, which is the second portion of Exhibit 20, and I believe, if you will refer to the third paragraph on the first page, reference is made to transmission to the Navy Department of a letter by you dated February 19, 1952? A. Yes, sir.

Q. I now hand you what has been introduced in evidence as Plaintiff's Exhibit No. 6.

A. Yes, sir.

Q. Is that what is referred to in the Navy Department letter? A. It is, sir.

(Testimony of John V. Ahearn, Sr.)

The Court: What is the number? Do you know what it is?

The Witness: Yes, sir, I do. [345]

The Court: What is it?

The Witness: A copy from Westinghouse Electric to Ahearn Electric showing the amount of material, the shipping dates of that——

The Court: It is a copy of February 19, 1952, letter from Upson to you, is it not?

The Witness: Yes, sir.

* * *

Q. (By Mr. Hoof): Mr. Ahearn, I now want to refer very briefly to the testimony of Mr. Blackman. Did you at any time, sir, have any difficulty of any kind with the Navy Yard or any inspectors in the Navy Yard relative to any drinking on your part? A. No, sir.

Q. Did you, sir, at any time have or bring any bottles of beer to employees of the Ahearn Electric Company working on this particular contract into the Yard for them to have at lunch?

A. No, sir.

Q. Did you, sir, ever at any time take any of your employees who were working on this contract from the Yard to have drinks or otherwise and then bring them back to the Yard? [346]

A. Absolutely not.

Q. Reference has been made to certain beer bottles by Mr. Blackman in the Officers' Quarters. In other words, they were presumably in a restroom,

(Testimony of John V. Ahearn, Sr.)

as I view the testimony. Do you know, sir, anything about that?

A. Yes, sir, I do. I heard about it.

Q. And what was the situation about that?

A. Mr. Rockwell told me that some of the men was using that lavatory up there and leaving beer bottles in there. Now, I don't know. Our men was using it, but I don't know anything about it. He told me that, and I didn't know anything about it.

Q. Did you ever hire or fire any men on the job?

A. Absolutely not. Mr. Rockwell had the complete charge in the Yard.

Q. And if any of the men employed by the Ahearn Electric Company were, in fact, violating any of the regulations of the Yard or were otherwise acting improperly as workmen, whose duty was it to reprimand them or discharge them or to take other appropriate action?

A. The foreman. Mr. Rockwell had absolute authority.

The Court: You might inquire, if you are [347] so minded, concerning the defendant Ahearn's sobriety on or about the March 10, 1952, date.

Mr. Hoof: Yes, your Honor. I will. I will come to that, sir.

Q. (By Mr. Hoof): Now, on or about March 10, 1952, Mr. Blackman has testified that you had on that date, and prior presumably to your meeting with Mr. Upson and Mr. Novich, two or three coffee royals. Is that true or false?

(Testimony of John V. Ahearn, Sr.)

A. That is false. [348]

* * *

Q. Now, with reference to Mrs. Ahearn, from the time that you moved into the country, which you had previously testified was in the fall of 1951, what was the practice with reference to Mrs. Ahearn and yourself coming to town, that is, to Bremerton, to the place of [349] business?

A. I would come in, go to work. She would take care of the correspondence.

Q. No. What was the practice with reference to your coming to town? Would you come together or otherwise?

A. Oh, we had to come together in the car.

Q. And then during the course of the day, where would she be? A. She would be in the office.

Q. And where, sir, did you have your lunches?

A. At the office.

Q. And where were they made up?

A. At home.

Q. And you had luncheon together?

A. Yes, sir.

Q. Who had lunch together?

A. My wife and I.

Q. And at the end of the day, what was the practice with reference to returning home?

A. We would go home after.

Q. No. What was the practice? Did you go together? A. Yes.

Q. In your car? [350]

(Testimony of John V. Ahearn, Sr.)

A. In the car, yes, sir.

Q. Did you have more than one car?

A. Yes, but I didn't run the other car.

Q. Did Mrs. Ahearn run the other car?

A. No. My boy run it.

Q. Did your wife drive it?

A. No. She never drove his car.

Mr. Hoof: You may cross-examine.

Cross-Examination

By Mr. Lane: [351]

* * *

The Court: So am I. I think much of this witness' answers might have been not as clear as they might have been if he had better hearing. I think he has a very substantial impairment of hearing.

The Witness: I am trying to help. [352]

* * *

Q. Did you or did you not testify, Mr. Ahearn, when you started testifying, that Mr. Upson came to your place of business on January 31, 1952, and brought you the quotation, which is Exhibit 3? Is that what you testified to? A. Yes, sir.

Q. And you are positive and certain of that date, are you? A. Yes, sir.

Q. And then, as I understand, you recalled that date because the next day you came to Seattle on the ferry and put your bid in at 2:00 o'clock?

A. Yes, sir. [353]

Q. Is that right? A. That is right.

(Testimony of John V. Ahearn, Sr.)

The Court: What time in the day? At 2:00 o'clock?

The Witness: In the afternoon.

Q. (By Mr. Lane): And at that time you had this quotation and you had had the previous conversation with Mr. Upson the day before when he handed you Exhibit 3, is that correct?

A. When he gave me the Exhibit, we figured out the price of the wire and the things that was lacking. I had to have that to place my bid.

Q. Mr. Upson handed this to you on January 31?

A. Yes, 31.

The Court: What is the nature of "this"?

Mr. Lane: The quotation.

The Witness: It is a quotation for the wire and for the other materials that went in there that was lacking.

The Court: What year?

The Witness: 1952.

The Court: January, 1952?

Mr. Lane: January 31, 1952, your Honor, and that is the date of this quotation also. [354]

The Court: Mr. Lane, for my convenience, do you hold in your hand and are you now referring to Plaintiff's Exhibit 3?

Mr. Lane: Yes, your Honor.

The Court: You may inquire.

Q. (By Mr. Lane): Now, this quotation, Mr. Ahearn, states that the cable in question, the paper-wrapped cable, could not be delivered until the third quarter of '53, does it not? A. Yes, sir.

(Testimony of John V. Ahearn, Sr.)

Q. And that was your recollection as to what that quotation stated at that time? A. Yes.

Q. Now, did you question Mr. Upson at that time as to whether or not that cable could be furnished earlier than that date?

A. He could furnish the cable within time.

Q. That is what Mr. Upson told you?

A. On time, yes. I made a statement at the time.

Q. Now, did that raise some question in your mind as to whether or not you should get that statement in writing?

A. No, sir. I will tell you the reason why. [355] I have been in business there since, oh, I will say '37 up to '52. I done business with Westinghouse, one of the biggest accounts that I had I gave to Westinghouse. I trusted them. When a man says he will deliver, I trusted their word, and we all do that, and if he could have delivered that on time, I took their word for it.

Q. You had been in the electrical business a long time, as you say? A. That is right.

Q. You knew the difference between the cost of latex and—— A. I did, sir.

Q. Latex cost about three times as much as the other wire? A. Yes, sir. [356]

* * *

Q. When did you become first concerned with the delivery date of paper-wrapped wire? [360]

A. I never become concerned any time. I figured there that Westinghouse would fulfill what they

(Testimony of John V. Ahearn, Sr.)

told me they would do, and I never had doubted them. I just had to keep on writing them and ask for the delivery dates for the transformers for the wire and the fiber duct. Whenever I got the answer from them, I would ship this copy over to Pier 99, Seattle, to let them know when any of the materials was coming in.

Q. Now, then, you received Exhibit No. 6, which is the Westinghouse letter, dated February 19, 1952, did you not? You received that letter, as I recall?

A. Yes, I believe, yes, that is right.

Q. And that letter called your attention to the fact, did it not, that paper-wrapped cable could not be delivered until the third quarter of '53?

A. I seen that on there, yes.

Q. And it also called to your attention the fact that latex cable could be delivered in the third quarter of '52, did it not?

A. That is right.

Q. And did you pay any attention to that?

A. I didn't pay no attention to that. I sent it over to Pier 99 because I figured Westinghouse would fulfill their contract, because he stated there that he would get it on time there, and I didn't think anything [361] more about the wire.

Q. And you never had any further discussion?

A. I never had no more discussion about the wire, never entered my mind about the wire at all, or even the transformers.

Q. Why did you ask the Navy to approve it or why did you get their approval to use it?

A. That is one thing I never did do.

(Testimony of John V. Ahearn, Sr.)

Q. They gave you the approval to use latex?

A. I never asked for latex. Now, what I understand is, this Westinghouse must have called up Pier 99.

Q. Just tell me what you know about it.

A. Somebody called up there and asked for approval. I never asked for approval.

Q. Well, why, then, would you send the Westinghouse letter of February 19 over to the Navy?

A. Because I sent all copies over of what Westinghouse sent me, what had anything on about delivery dates.

Q. You just automatically——

A. Just automatic copy. That was all.

Q. Would it be possible that you sent over to the Navy the copies of your invoices covering latex that were sent to you? [362]

A. No. The last one I sent there when the bill came in. That is when I went over there.

Q. Is it possible that you might have sent the invoices over that were sent to you, Exhibits Nos. 10 and 11?

A. I only sent one invoice over to them. That was the invoice that I received on the price of the latex wire. That is the only one I sent over to them, invoice.

Q. Did you make an estimate for a draw for the Navy based upon the use of latex, as Mr. Rockwell testified to in his deposition?

A. I had to. That is the only way I could get the money. The amount what is on the grounds, the

(Testimony of John V. Ahearn, Sr.)

price, I have to prove the price, what is in [363] there.

* * *

Q. Now, you say that at the meeting on March 10, 1952, you did not know whether or not Mr. Rockwell was present, is that right?

A. That is what I said. I can't recall whether he was present or not.

Q. You said that, at that meeting Mrs. Ahearn was there? A. Yes.

Q. And Mr. Adams? A. Yes.

Q. And you say there was no discussion whatsoever regarding latex?

A. That is right, no discussion at all. We didn't have to worry about it. Never even thought about latex.

Q. Was there any discussion at that time relative to the cable at all? A. None at all.

Q. All right. Let me ask you this question: Was there any discussion as to the change in the lengths of the cable on that date? [364]

A. No, sir, never brought to my attention, the lengths.

Q. You never had any discussion then with any representative of Westinghouse relative to the change in the lengths of the cable from the date you originally ordered it on February 5, '52, until after the cable arrived at your plant, is that your testimony?

A. Not me, personally, no. I didn't know the lengths. I absolutely did not know the lengths of the

(Testimony of John V. Ahearn, Sr.)

cable or anything that was ordered on that. Mr. Rockwell would give me the lengths and then send in for it and give the order.

Q. Your testimony is that you yourself had no discussion—— A. Pardon me?

Q. Your testimony is that you yourself had no discussion with the Westinghouse man relative to cable at all? A. No.

Q. From February 5——

A. Not the lengths, no.

The Court: Well, he asked anything relating to the subject of cable, not only lengths, but anything about the cable.

The Witness: There was some other cable [365] that was ordered.

The Court: He asked about your conversation.

The Witness: No, none at all.

The Court: You will have to try to make the witness understand. I have the impression that much of his difficulty and irresponsiveness is due to not hearing what is being asked. I may be wrong about that, but that is the impression I have been getting right along since he has been on the stand. Proceed.

Q. (By Mr. Lane): Do you know whether or not Mr. Rockwell had any discussion with any representative of Westinghouse relative to cable from February 5, 1952, until the latex cable was delivered?

A. Latex, you said? He stated to me that he didn't know anything about the change.

The Court: Does it concern you that he has said

(Testimony of John V. Ahearn, Sr.)

under oath something different from what you just said, Mr. Ahearn?

The Witness: Maybe I didn't quite understand the question. He stated "a cable" at first and then comes on with "latex."

The Court: The witness does not understand the question. [366]

The Witness: Not to me he doesn't state there is any difference about the latex cable.

The Court: Did Mr. Rockwell ever come to you or did you send for him, and as a result did he come to you, and did you and he have a talk about the circumstance of the substitution of latex for paper-covered cable?

The Witness: No, sir; no, sir. He never said a word to me.

Q. (By Mr. Lane): Was there any discussion between you and Mr. Rockwell as to the telephone cable at all between February 5, 1952, and the date it was delivered? A. No, none at all.

Q. There was never any discussion at all?

A. No discussion between Mr. Rockwell and I.

The Court: Do you recall Mr. Rockwell, in discussing cable or substitution of latex cable with you, referring to your files to see if you could find a copy of any invoice or statement or contract or anything in your files relating to such substitution?

The Witness: He never said anything to me about any substitution.

The Court: Did he ever direct your [367] attention to your files and suggest that you look through

(Testimony of John V. Ahearn, Sr.)

your files and see if you could find any papers from the supplier, Westinghouse, relating to the substituted latex?

The Witness: No, sir.

Q. (By Mr. Lane): Mr. Ahearn, as I recall your testimony, when you had your meeting with Mr. Upson after the cable was delivered, Mr. Upson told you that you had ordered the cable and you said: "I did not"? A. Absolutely, I said that.

Q. That is right, and then he said: "We will try to straighten it out." I think those are your exact words, is that what he said?

A. Yes, that is right.

Q. And then you said: "I won't accept it." Is that correct?

A. I told him I wouldn't accept the cable, yes.

Q. Mr. Ahearn, I have asked you to produce all of your yellow sheets that you got from the Westinghouse on this job covering the material supplied for this job. I will refer now to Exhibit 14. Are those all of the—what are they called up at the top, Mr. Ahearn, please?

A. Acknowledgments. [368]

Q. Are those all of the acknowledgments that you have in your file?

A. That is all I can find, sir.

Mr. Lane: If your Honor please, I would now like to reoffer Exhibit 14 to show that it contains only a part of the materials which Westinghouse supplied on this job. That is the only purpose of offering it.

(Testimony of John V. Ahearn, Sr.)

The Court: I think it has been stated prior to this time that the same thing is attached to Defendant's Exhibit A-5 and is already received in evidence.

Mr. Lane: No, your Honor. These are the acknowledgments that are mailed by Westinghouse to the customer at the time the material is ordered, and my purpose in offering this is to show that it only covered a part of the material that Westinghouse supplied, and, therefore, it ties in with our theory of the case, that Mr. Ahearn's records were not well kept, and that he is only able to find, now find, a part of the acknowledgments that were sent to him.

The Court: Any objection?

Mr. Hoof: No. I have no objection.

Mr. Lane: That is the only purpose of it. [369]

The Court: As I understand, that is Plaintiff's Exhibit 11?

Mr. Lane: It is 14, I believe, is it not?

The Court: I do not know what it is.

Mr. Lane: It is a group of acknowledgments that were mailed by Westinghouse to Mr. Ahearn covering part of the material that was furnished on this Navy job.

The Court: Plaintiff's Exhibit 14 is now admitted.

(Plaintiff's Exhibit No. 14 received in [370] evidence.)

* * *

(Testimony of John V. Ahearn, Sr.)

Q. Mr. Ahearn, I was not quite sure, as I understood your testimony, as to when you sold your shop known as the Ahearn Electric Company. Was that around the end of October, did you say?

A. The first of October.

Q. 1952? A. Yes.

Q. And the people that you sold it to were permitted to use the name "Ahearn Electric Company"? A. Yes, sir.

Q. And at that time you moved your office or your shop out to your home, is that my understanding?

A. I moved all the records out, moved everything. [372]

* * *

The Court: Call the next witness.

Mr. Hoof: Mr. Flechsig.

The Court: Mr. Flechsig is now called as a witness on behalf of the defendant?

Mr. Hoof: Yes, your Honor. May the record show that he is called as an adverse witness?

The Court: That is what I was trying to bring out or give you an opportunity to bring out. If that is what you desire, the record will show that.

A. J. FLECHSIG

called as an adverse witness by and on behalf of defendant, having been previously sworn, was examined and testified as follows: [374]

Direct Examination

By Mr. Hoof:

* * *

Q. And Mr. Flechsig, I am going to ask to have handed to you what is marked and introduced in evidence as Plaintiff's Exhibit No. 4, which is the original purchase order from the Ahearn Electric Company to the Westinghouse Company.

A. That is right, Mr. Hoof. I have it.

Q. And that Exhibit being the original order—or I shouldn't say the order, that, is it not, is a take-off of material for the purpose of submitting your quotation?

A. That is not the case.

Q. That is the purchase order?

A. That is right.

Q. I think you are correct on that, and that was drawn up, as the testimony shows, by Mr. Upson on Mr. Ahearn's stationery or paper at his office in Bremerton?

A. That is as I understand it. [375]

Q. Now, that appears to bear Mr. Ahearn's signature as the purchaser?

A. That is correct, so far as I know.

Q. Yes. Now, in your files or in the records of the Westinghouse Company, is there any other document relating to any of the materials on this job which bears the signature of Mr. Ahearn with ref-

(Testimony of A. J. Flechsig.)

erence either to purchase or to change orders or to anything of that kind?

A. To my knowledge, no.

Mr. Hoof: No further question.

Mr. Lane: I have no questions.

The Court: You may step down. [376]

* * *

The Court: Mr. Bailiff, will you let Mr. Flechsig in his present position at counsel table look at that Exhibit 4, Plaintiff's Exhibit 4, and point out any words or figures thereon relating to the type of cable as indicating, if it does, the specification of the cable ordered, indicating whether, it was paper covered or latex covered?

(Plaintiff's Exhibit No. 4 is handed to Mr. Flechsig.)

Mr. Flechsig: Your Honor, on the fifth line, it reads: "1900 feet, 6 pair, 19 gauge, paper wrapped, lead covered, WE," which stands for Western Electric type, "ENB," and then, "1700 feet, 26 pair, ditto."

The Court: That means more of the paper covered?

Mr. Flechsig: Right. It means that the only difference between that second item and the item above is the number of pairs. Then the next line is, "1100 feet, 51 pair, ditto." After that it says, "one piece."

The Court: Is there anything said on that order about latex?

Mr. Flechsig: Your Honor, there is not.

The Court: You may proceed. Call the next witness. [377]

MRS. GOLDIE AHEARN

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hoof:

Q. Will you state your name, please?

A. Mrs. John Ahearn.

* * *

Q. Mrs. Ahearn, you are the wife of John V. Ahearn, Sr., who is named as a defendant in this case, are you not? A. Yes, sir.

Q. And how long have you and Mr. Ahearn been married? A. Thirty-two years this June.

Q. Where do you live, Mrs. Ahearn?

A. At Route 6, Box 3172, Bremerton. [378]

* * *

Q. Have you at any time worked in the office of the Ahearn Electric Company?

A. Yes, sir.

Q. And when, Mrs. Ahearn, did you work there? When did you start? A. The 1st of January.

Q. Of what year? A. Of '52.

Q. What, Mrs. Ahearn, did your work consist of?

A. Taking care of the offices and the customers and the books.

(Testimony of Mrs. Goldie Ahearn.)

Q. Were you acquainted with a Mr. Lawrence B. Blackman? A. Yes, sir.

Q. Was he an employee of the Ahearn Electric Company? A. Yes, sir.

Q. Now, from time to time, Mrs. Ahearn, [379] after you commenced work at the electric company in the month of January, as you have testified, in 1952, what office work from that date on, if any, did Mr. Blackman perform?

A. None at all,

The Court: Office work?

Mr. Hoof: Yes, sir.

A. (Continued): Just his own account, appliance account.

Q. Did he do any office work for the Ahearn Electric Company? A. Definitely no.

The Court: What kind of work did he do with respect to his account?

The Witness: He repaired appliances.

The Court: He repaired——

The Witness: Appliances.

The Court: For whom?

The Witness: Any one that brought an out of order appliance in.

Q. (By Mr. Hoof): Now, to clarify the particular matter, Mrs. Ahearn, what were Mr. Blackman's arrangements with the Ahearn Electric Company? A. To work on a percentage.

Q. As part of that, he has testified that [380] he maintained a little shop for rewinding of motors and armatures?

(Testimony of Mrs. Goldie Ahearn.)

A. Well, it was just a bench at one end of the shop.

Q. Well, now, with reference to his own books, you say that he took care of those on his own appliances? A. He took care of his own books.

Q. Now, from the early part or the first week of January of 1952, did he at any time do any typing for the Ahearn Electric Company as such?

A. No.

Q. Who did the typing? A. I did.

Q. Were you acquainted with an employee by the name of Mr. Adams? A. Yes, sir.

Q. And what was his employment with the Ahearn Electric Company?

A. He came and worked, took care of the shop, from 6:00 to 12:00 in the morning.

Q. What work did he perform?

A. He answered telephone calls and waited on the customers. [381]

* * *

Q. Handing you what has been marked for identification as Defendant's Exhibit No. A-6, that being what is marked on the outside of the cover "Weekly Time Book," now, will you state what that is, if you please?

A. That is the time book the rest of the men have, and they kept their own time in it, and then I checked from this.

The Court: What persons are included in your phrase "the rest of the men"?

(Testimony of Mrs. Goldie Ahearn.)

The Witness: Any one who did work for us.

The Court: Anyone other than your husband working for the defendant Ahearn Electric Company?

The Witness: Yes.

The Court: Is that what you mean?

The Witness: Yes, sir.

Q. (By Mr. Hoof): And did each of the several employees in the company have their own time book? A. Those who worked in the shop.

Q. Had their own time books? A. Yes.

Q. And with reference to Exhibit No. A-6, being the time book, whose time book is that, please?

A. Mr. Adams. [383]

Q. I will ask you whether or not that is a book of original entry? A. It is.

Q. And by whom was the book made? I am not speaking about the purchase, but I am speaking about the entries in the book.

A. Mr. Adams made his own entries.

Q. And then what was done with the entries that he made?

A. I checked them and gave him his check from that book.

Q. Now, what, Mrs. Ahearn, does the book show with reference to Mr. Adams' employment—

The Court: You cannot ask what it contains because it is not in evidence yet. I understand there is no objection, but you have not offered it.

Mr. Hoof: I should like to offer it.

(Testimony of Mrs. Goldie Ahearn.)

The Court: Defendants' Exhibit A-6 is now admitted.

(Defendants' Exhibit No. A-6 received in evidence.)

The Court: Now, you can ask her what is in it. [384]

Q. (By Mr. Hoof): Mrs. Ahearn, what does the book show with reference to Mr. Adams' employment on the date of March 10, 1952?

A. That he put in four hours.

The Court: March 10, 1952, is that right?

The Witness: Yes, sir.

Q. (By Mr. Hoof): He worked what?

A. Four hours.

The Court: Can you tell from that what time of day he worked?

The Witness: He always quit at 12:00.

The Court: That was the four hours from 8:00 to 12:00?

The Witness: Yes, sir.

Q. (By Mr. Hoof): And now would you kindly examine Defendants' Exhibit A-7, which appears to be a check to Mr. Adams?

A. Yes, sir. I have it.

Q. Will you state what that is?

A. That is the check for that week's pay, and he bought——

The Court: Is it pay for that work done [385] by Mr. Adams on March 10, 1952?

(Testimony of Mrs. Goldie Ahearn.)

The Witness: No, for that week, for the week of the 10th to the 15th.

The Court: Does it or does it not include March 10, 1952?

The Witness: Yes, sir.

Q. (By Mr. Hoof): And did he receive his full pay for the week less purchases made from the firm? A. Yes.

Q. And the purchases made from the firm are likewise shown in the book? A. Yes.

Mr. Hoof: I offer Defendants' Exhibit A-7.

The Court: Admitted.

(Defendants' Exhibit A-7 received in evidence.)

The Clerk: Defendants' Exhibit A-8.

(Cash Journal marked Defendants' Exhibit A-8 for identification.) [386]

* * *

Q. Handing you for identification, Mrs. Ahearn, what has been marked as Defendants' Exhibit A-8, will you kindly state what that is?

A. That is the cash book we started the [387] first of the year 1952, and it is being used up to the present date.

Q. Mrs. Ahearn, when you say "we," are you referring to the Ahearn Electric Company?

A. Well, it is Forest Electric now.

Q. But in '52—— A. Yes.

(Testimony of Mrs. Goldie Ahearn.)

Q. But in '52, it was Ahearn Electric Company?

A. Yes.

Q. Will you examine the book and advise me whether I am correct in the dates I advised the Court that it covers, namely the period from January 5, 1952, through April of 1954?

A. That is right, yes. Now, we have so little—it is June 2nd. You didn't see that probably down below. We are doing practically nothing now. It is June 2, 1954, is the last date of entry in the cash book. [388]

* * *

Q. Mrs. Ahearn, during the year of 1952, where was that book, being Exhibit A-8, kept?

A. It was kept in the shop at all times.

Q. That is the Ahearn Electric Company?

A. Yes.

Q. And by whom are the entries made in the book during the period from January 5, 1952, through the period of, let us say, up until March of 1953?

A. Some are made by me and some by my husband, and I see a few here by my son.

Q. By the way, is that a book that has to do with other than cash?

A. It is credit, credit accounts, too.

Q. Credit accounts, too? A. Yes.

Q. And what, Mrs. Ahearn, was the practice with reference to the book as to entries being made on the dates that entries were to be made, in other words, [389] when an event occurred?

(Testimony of Mrs. Goldie Ahearn.)

A. When the people came in, the entry was made at that time, and if the checks came in, they were entered that same day.

* * *

(Defendants' Exhibit No. A-8 received in evidence.)

The Court: Now you can read any word in it or any figure in it or any page or anything else that counsel wishes read. Page 5 was referred to in the last question.

A. I have seven entries on the 10th of [390] customers, credit customers.

The Court: That is not clear in my mind. Read the question.

(The last question is read by the reporter as follows: "Q. What does that show with reference to the date of March 10, 1952, as to who made the entries"?)

Q. (By Mr. Hoof): Who made the entries?

A. I did.

Q. On what date were they made?

A. March 10th.

Q. By yourself? A. Yes, sir.

Q. Now, Mrs. Ahearn, on March 10, 1952, where were you on that date?

A. I was in the shop. I came in with my husband in the morning like we always do.

Q. And how long during the day did you remain there? A. Remained all during the day.

(Testimony of Mrs. Goldie Ahearn.)

Q. Did you or did you not see Mr. Upson and Mr. Novich at the shop on that day?

A. I remember meeting Mr. Novich that day, yes. [391]

* * *

Q. Do you know at the time that Mr. Novich and Mr. Upson arrived whether or not Mr. Rockwell was present?

A. That I can't remember. I don't recall that.

Q. Do you know whether a Mr. Blackman, an employee, was present?

A. No. He was not.

Q. And where was he?

A. He was in the Navy Yard that day.

Q. On the 10th day of March, 1952, was Mr. Blackman at any time in the shop?

A. Not until evening. [392]

* * *

Q. Now, if you will carefully listen. Were any of the materials necessary or required to perform the Navy Yard contract ever stored at your address of 608—or whatever it was—where the shop was and the office [394] was, were any materials for the Navy Yard contract ever stored there?

A. No, sir.

Q. Can you tell me whether any work other than office work relative to the performance of the Navy Yard contract was ever done at the office or in your storage facility adjacent to the office for materials?

A. No, sir.

(Testimony of Mrs. Goldie Ahearn.)

Q. Where were the materials for the performance of the Navy Yard contract delivered, if you know?

A. To the shack in the Navy Yard. We called it—it is what they call it—the shack. It was his office in the Navy Yard. We constructed the building ourselves.

Q. For storage facilities down there?

A. Yes.

Q. Now, Mr. Blackman, Mrs. Ahearn referred to using an oven of a stove for the keeping of records. Would you explain that, please?

A. The house on the other side of the shop had had two fires in just a short time, and I was concerned about having some more trouble, so I started putting the records in the electric range because it was insulated and it was porcelain, and I figured if there was a fire, at least we would have our records, which was [395] the most important.

Q. That was a new range? A. Yes, sir.

Q. Not one that was used to cook on?

A. Never had been hooked up, no.

Q. And what time of the day, Mrs. Ahearn, did you put the records there, if there was a time of day?

A. Well, sometimes we didn't get away until 6:00 or 7:00 o'clock in the evening, but whenever we left, that was the last thing I did, was put my records away.

The Court: I think he was asking, with reference to day or night, was there any difference when

(Testimony of Mrs. Goldie Ahearn.)

the receptacle in question was used for storage or safekeeping of records.

The Witness: Just at night.

Q. (By Mr. Hoof): On March 10, 1952, Mrs. Ahearn, where were you during such periods of time as Mr. Upson and Mr. Novich were in the office of the Ahearn Electric Company in Bremerton?

A. I was at my desk.

Q. And would that be in the same room or another room than that in which they were present?

A. Right behind the counter, in the same [396] room.

Q. Did you at any time hear any comment with reference to latex wire?

A. No, sir. [397]

* * *

Q. Mrs. Ahearn, on one of my first questions to you, I asked you when you moved from Bremerton into the country.

A. 1951.

Q. Now, one moment please. Your answer to my question was "In the fall of 1952." Now was that a correct or an incorrect answer?

A. That was when we sold the store. We moved a year previous to that, in 1951, October 1. [407]

* * *

Q. Now, from and after the time that you moved to the Route 6 address, did you at any time live in the house adjacent to the shop?

A. No, sir.

Q. Or have you ever lived there since the fall

(Testimony of Mrs. Goldie Ahearn.)

of 1951? A. No, sir. [408]

* * *

Mr. Hoof: May I offer Defendant's Exhibit A-9, being the pay check of Mr. Blackman?

The Court: Let Mr. Lane see it.

Mr. Lane: Oh, I have no objection.

The Court: Defendant's Exhibit No. A-9 is admitted, the defendant's case in chief being opened up for that purpose only. [414]

* * *

MERRITT UPSON

called as a rebuttal witness by and on behalf of plaintiff, having been previously sworn, was examined and testified as follows: [417]

* * *

Redirect Examination

(Continued)

By Mr. Lane:

Q. Mr. Upson, you heard Mr. Ahearn's testimony that you were in his place of business on January 31, 1952, at which time you presented to him the quotation which is Exhibit No. 3, did you not? A. I did.

Q. And were you there at his office on that date?

A. No, sir.

Q. Do you know where you were on that date?

A. Port Angeles, Washington.

The Clerk: This will be Plaintiff's Exhibit No. 21.

(Testimony of Merritt Upson.)

(Expense Account marked Plaintiff's Exhibit No. 21 for identification.)

The Court: If that material has a name, [422] will you please assign it, counsel?

Mr. Lane: This, your Honor, is an expense account of the witness, Mr. Upson, covering the period January 25, 1952, to February 22, 1952.

Mr. Hoof: What is the number of that exhibit?

The Court: Plaintiff's No. 21.

Q. (By Mr. Lane): Mr. Upson, I show you what has been marked Plaintiff's Exhibit 21 and ask you to state what that is, please, if you know?

A. That is my expense account for the month between the dates of January 25, 1952, and February 22, 1952.

Q. And will you tell the Court how that expense account is kept and made up and when it is made, please?

A. Each day I make a running account of the expenses or moneys I have spent that day in pencil, and at the end of the period, when I have to turn this in, I rewrite it on this form. [423] (Indicating.)

* * *

Mr. Hoof: Do I understand, Mr. Upson—I don't mean to delay this—but is each one of the documents prepared by you in your own handwriting?

The Witness: Yes, sir.

(Testimony of Merritt Upson.)

The Court: Plaintiff's Exhibits 21 and 22 are now admitted.

(Plaintiff's Exhibit No. 21 received in evidence.)

(Plaintiff's Exhibit No. 22 received in evidence.)

Q. (By Mr. Lane): Mr. Upson, would you look at both of those exhibits, 21 and 22, and tell the Court what they show with reference to where you were, what you spent on the [427] days of January 30 and January 31, 1952?

A. On January 30, I was at Port Angeles, Washington. The room was \$4.12. Meals were \$3.35, I believe. Telegraph and telephone, etc., \$1.15. Entertainment, \$3.35. A total of \$11.97.

Q. That is which day now?

A. That is January 30, 1952.

Q. Then where were you on the 31st?

A. The 31st I was in Port Angeles. I have no room that day, because that is the day I came home for a meeting that evening, but I do have meals in here at \$2.65. Entertainment, which would be lunch in this case, \$1.50. That makes a total of \$4.35. Then ferry fare, \$2.63.

Q. Now, which ferry fare is that? Which ferry did you take?

A. That would be the ferry from South Point to Lofall; Kingston to Edmonds. That is two separate ferries.

(Testimony of Merritt Upson.)

Q. Yes. Is that the ferry you took coming home that day? A. Yes, sir.

Q. And you went directly home?

A. Yes, sir.

Q. Now, there is a bill there showing your [428] hotel bill that you paid in Port Angeles?

A. Yes, sir.

Q. That is attached to which exhibit?

A. 21.

Q. That is the last sheet on Exhibit 21, is that right? A. Yes.

Q. Now, the evening of January 31, 1952, what did you do?

A. I attended a Westinghouse production show in the New Washington Hotel.

Q. And how do you know that you did that on that date?

A. Because when this was coming up, invitations were mailed to different contractors and men who would be interested in this particular show, and I had three gentlemen from Port Angeles that came down.

Q. And how do you know that that was the day, Mr. Upson? Is there anything in your expense account to show that?

A. Yes. On January 31, 1952, I show "Seattle" and "Production Ahead" meeting it was called, expenses \$5.85.

Mr. Lane: That is all, Mr. Upson.

Mr. Hoof: I have one question. [429]

(Testimony of Merritt Upson.)

Recross-Examination

By Mr. Hoof:

Q. Is there any doubt in your mind, Mr. Upson, but what prior to the time the bid was made by the Ahearn Electric for the particular job in question that you discussed the matter with Mr. Ahearn? There is no question about that? A. No, sir.

Q. You did discuss it? A. I did not.

Q. Never discussed it? A. No, sir.

Q. Did you discuss it with Mr. Rockwell?

A. No, sir.

The Court: What date is it in January that you claimed you were in Port Angeles instead of in Bremerton?

The Witness: January 31, 1952.

The Court: Did you phone Mr. Ahearn on that day?

The Witness: No, sir.

The Court: Did you, in your previous testimony, say that you did?

The Witness: To the best of my knowledge [430] I didn't in my testimony.

* * *

Q. (By Mr. Hoof): I would like, Mr. Upson, to refer you to your pre-trial deposition on page 4.

The Court: I would like for you to expedite this matter.

Mr. Hoof: Well, this will be my last question, your Honor.

(Testimony of Merritt Upson.)

The Court: Both sides may have to submit it without argument if you do not hurry along.

Q. (By Mr. Hoof): I am now referring to your pre-trial deposition on page 4, line 6. I will ask you whether or not, Mr. Upson, the following questions were asked and in answer to the questions you gave the answers which I will read:

“Q. I say: When did you first contact Mr. Ahearn or when did Mr. Ahearn contact you with reference to the work that was finally performed under this contract? [431]

“A. I don’t recall whether he contacted me or our office for a quotation on this particular job which was coming up.

“Q. Do you recall when you were first contacted, one way or the other, however it may have been? A. On this particular job?

“Q. Yes.

“A. No, I don’t recall whether I delivered the bids or whether I mailed them. Sometimes you deliver the bids and sometimes they go out in the mail.

“Q. You were contacted either directly or indirectly by the Ahearn Electric Company prior to the bidding, were you not? A. Yes.

“Q. A list of required materials to perform the bid was taken off of the invitation, was it not?

“A. That is right.

“Q. Did you participate in taking that off?

“A. Did I?

“Q. Yes. A. In this particular bid?

(Testimony of Merritt Upson.)

“Q. Yes. [432] A. No.”

Were those your questions and your answers given?

A. The one you refer to—I don’t know the number of it—I think it was about—That is my deposition. Is that what you were asking, if that was in my deposition?

Q. Yes, the questions that I asked and the answers that you gave, that is correct?

A. Yes, sir.

Mr. Hoof: No further questions. [433]

* * *

A. J. FLECHSIG

called as a rebuttal witness by and on behalf of
amined and testified as follows:

Direct Examination

By Mr. Lane:

Q. Exhibit 14 is what, Mr. Flechsig?

A. Exhibit 14 is a group of acknowledgments on direct shipment tickets.

Q. To whom?

A. The top one is Ahearn Electric.

Q. And that covers material on this Navy job, does it? All of those cover material on the Navy job? [434]

A. From having previously examined them, yes.

Q. Now, in relation to Exhibit 14, have you had

(Testimony of A. J. Flechsig.)

occasion just lately to check that with your copy of the ledger account that is admitted in evidence?

A. I did hurriedly check it; yes, sir, I did.

Q. Now, how many of those order acknowledgments are contained in Exhibit 14 out of the total number on this Navy job?

A. From my quick check, eight. If I may refer to my notes (referring to notes), this list covers eight, and ten are not included.

Q. In other words, there are ten of those missing from that group covering the job at Bremerton, is that right? A. That is correct.

Mr. Lane: That is all.

Cross-Examination

By Mr. Hoof:

Q. How many sheets are there there in that exhibit, Mr. Flechsig? There are some 15 sheets are there?

A. That is right. I would have to count them but there are more sheets than there are ticket numbers. [435]

Q. And have you compared those with the list of materials itself that were furnished?

A. Have I compared this—

Q. Exhibit 14, the acknowledgments, with the list of materials furnished, to check off against Exhibit 14 the actual materials furnished by the Westinghouse?

(Testimony of A. J. Flechsig.)

A. Mr. Hoof, that I have not. There is only one of them that I know from memory, and that is the top one. If you mean this list does not include the item of telephone wire, which is in question——

Q. No. We have already agreed upon that, Mr. Flechsig, that it does not include the telephone wire, but what I understand is that you merely made a hasty run-down on those acknowledgments against the job account sheet which has been introduced in evidence, as distinguished from checking the materials listed on the acknowledgments against the materials that were actually furnished by your company. I except, however, from my statement the matter of telephone wire which we agree is not included in there. Am I correct on that?

A. You are correct on that. [436]

* * *

Certificate

I, Frances I. Gilligan, Official Court Reporter in and for the within-entitled Court, hereby certify that the foregoing is a full, true and correct transcript transcribed from my Stenograph notes by me or under my direction, to the best of my knowledge, and that any and all omissions from the transcript have been parenthetically noted.

/s/ FRANCES I. GILLIGAN,
Official Court Reporter.

[Endorsed]: Filed September 2, 1954. [443]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith the following original documents and papers in the file dealing with the above-entitled cause, being all thereof, including Plaintiff Exhibits 1 to 22 incl., and Deft. A-1 to A-9, incl., as the record on appeal from the Judgment of Dismissal with Prejudice filed Aug. 2, 1954, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed Nov. 10, 1953.
2. Praecipe for summons, filed Nov. 10, 1953.—
(Deft. Ahearn, Sr.)
3. Marshal's Return on Summons, filed Nov. 20, 1953.
4. Marshal's Return on Summons, Aetna Cas. & Surety Co., et al., filed Nov. 30, 1953.
5. Appearance of Deft. Aetna Cas. & Surety Co., filed Dec. 8, 1953.
6. Appearance of John V. Ahearn, Sr., filed Dec. 8, 1953.

7. Answer of Defendants, filed Jan. 28, 1954.
8. Praecipe, Ptff. for subpoena, Rockwell, filed June 7, 1954.
9. Praecipe, Ptff. for subpoenas, John V. Ahearn, Sr., et al., filed June 10, 1954.
10. Deposition of John V. Ahearn, filed June 16, 1954.
11. Deposition of Merritt Upson, filed June 16, 1954.
12. Deposition of Edward Novich, filed June 16, 1954.
13. Deposition of Arthur L. Rockwell, filed June 16, 1954.
14. Deposition of Lawrence B. Blackman, filed June 16, 1954.
15. Motion for Order Amending Complaint, filed June 16, 1954.
16. Notice of Presentation of Motion, filed June 16, 1954.
17. Trial Memorandum of Plaintiff, filed June 16, 1954.
18. Marshal's Return on Subpoena, Ahearn, Sr., filed June 16, 1954.
19. Marshal's Return on Subpoena, Hoof, filed June 16, 1954.
20. Plaintiff's Supplemental Trial Brief, filed June 18, 1954.
21. Motion Ptff. for Reconsideration of Oral Decision and Alternative Motion for New Trial, filed June 23, 1954.
22. Court Reporter's Transcript of Court's Oral Decision, filed June 29, 1954.

23. Memorandum in Support of Plaintiff's Motion for Reconsideration, filed July 1, 1954.

24. Defendants' Memorandum re Implied Contract, filed July 1, 1954.

25. Plaintiff's Objections to Defendants' Proposed Findings of Fact, and Conclusions of Law, and Plaintiff's Proposed Changes Thereto, filed July 1, 1954.

26. Plaintiff's Objections and Proposed Changes in Defendants' Proposed Findings of Fact and Conclusions of Law, filed Aug. 2, 1954.

27. Order Denying Motion for Reconsideration of Oral Decision and Denying Motion for New Trial, filed Aug. 2, 1954.

28. Findings of Fact and Conclusions of Law, filed Aug. 2, 1954.

29. Judgment of Dismissal with Prejudice, filed Aug. 2, 1954.

30. Notice of Appeal by plaintiff, filed Aug. 30, 1954.

31. Bond for Costs on Appeal (Ind. Ins. Co. of N.A.), filed Aug. 30, 1954.

32. Court Reporter's Transcript of Proceedings at Trial, filed Sept. 2, 1954.

33. Designation of Contents of Record on Appeal, filed Sept. 24, 1954.

34. Statement of Points by Appellant, filed Sept. 24, 1954.

35. Stip. and Order for Transmission of Original Exhibits, filed Sept. 24, 1954.

I further certify that the following is a true and correct statement of all expenses, costs, fees and

charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit:

Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 30th day of Sept., 1954.

[Seal] MILLARD P. THOMAS,
Clerk,

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14537. United States Court of Appeals for the Ninth Circuit. United States of America for the Use of Westinghouse Electric Supply Company, a Corporation, Appellant, vs. John V. Ahearn, Sr., an Individual Doing Business Under the Firm Name and Style of Ahearn Electric Company and The Aetna Casualty and Surety Company, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 4, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14537

UNITED STATES OF AMERICA, for the Use of
Westinghouse Electric Supply Company, a
Corporation, and all Similarly Situated,

Appellant,

vs.

JOHN V. AHEARN, SR., an Individual Doing
Business Under the Firm Name and Style of
Ahearn Electric Company, and THE AETNA
CASUALTY AND SURETY COMPANY, a
Corporation,

Appellees.

APPLICATION RE EXHIBITS

Comes Now the Appellant and makes application to this Honorable Court for an order granting permission to have this court consider the exhibits designated as a part of the record in the above-entitled appeal in the original form, without the same being reproduced and printed as a part of the record on appeal.

This application is based upon a stipulation between counsel for all parties in this appeal, agreeing to the entry of such an order.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ W. BYRON LANE,

/s/ MARTIN P. DETELS, JR.,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 5, 1954.

In the United States Court of Appeals
for the Ninth Circuit

No. 14537

UNITED STATES OF AMERICA, for the Use of
Westinghouse Electric Supply Company, a
Corporation, and All Similarly Situated,
Appellant,

vs.

JOHN V. AHEARN, SR., an Individual Doing
Business Under the Firm Name and Style of
Ahearn Electric Company, and THE AETNA
CASUALTY AND SURETY COMPANY, a
Corporation,
Appellees.

STIPULATION

It Is Hereby Agreed and Stipulated by and between the parties to the above-entitled appeal, by and through their respective counsel of record, that the exhibits designated as a part of the record by each party in this appeal, may be considered by the court in their original form, and that the same

need not be printed as a part of the record on appeal.

Dated this 23rd day of September, 1954.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

By /s/ W. BYRON LANE,
Attorneys for Appellant.

HILE, HOOF, SHUCKLIN and
MERRILL WALLACE,

By /s/ CLIFFORD HOOF,
Attorneys for Appellees.

[Endorsed]: Filed October 5, 1954.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-
TION OF CONTENTS OF RECORD ON AP-
PEAL

Pursuant to the provisions of Rule 17 (6), Rules of Practice of United States Court of Appeals for the Ninth Circuit, the appellant, Westinghouse Electric Supply Company, files herein its statement of points and designation of contents of record on appeal, and adopts and by reference incorporates herein its statement of points and designation of contents of record on appeal previously served and filed and appearing in the typewritten transcript of the record on appeal filed in the office of the Clerk of the above-entitled Court.

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ W. BYRON LANE,

/s/ M. PAUL DETELS, JR.,
Attorneys for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed October 9, 1954.

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the
use of Westinghouse Electric Supply
Company, a corporation and all
similarly situated,

Appellant,

vs.

JOHN V. AHEARN, SR., an individual
doing business under the firm name
and style of Ahearn Electric Com-
pany and THE AETNA CASUALTY AND
SURETY COMPANY, a corporation,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

EVANS, McLAREN, LANE,
POWELL & BEEKS
W. BYRON LANE
MARTIN P. DETELS, JR.

Attorneys for Appellant.

Office and Post Office Address:
1111 Dexter Horton Building
Seattle 4, Washington

FILED

JAN 17 1955

FRAYN  LETTERPRESS

PAUL P. O'BRIEN,
CLERK

No. 14537

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the
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Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

EVANS, McLAREN, LANE,
POWELL & BEEKS
W. BYRON LANE
MARTIN P. DETELS, JR.

Attorneys for Appellant.

Office and Post Office Address:
1111 Dexter Horton Building
Seattle 4, Washington

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No. 14537

**UNITED STATES
COURT OF APPEALS**
for the Ninth Circuit

UNITED STATES OF AMERICA, for the
use of Westinghouse Electric Supply
Company, a corporation and all
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Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the
District Court for the Western District of Wash-
ington, Northern Division, dismissing with preju-
dice the complaint of the plaintiff, appellant herein,

United States of America for the use of Westinghouse Electric Supply Company (Tr. 25-6).

The complaint pleaded the existence of an express contract for the purchase from the use-plaintiff of certain latex-insulated telephone cable by the individual defendant, John V. Ahearn, Sr., used by him in the prosecution of work under a contract with the United States Government, and asserted a balance of \$5,469.51 with interest due on such contract. Recovery was sought against the individual defendant, as principal, and the corporate defendant, Aetna Casualty and Surety Company, as surety, on a payment bond furnished to the federal government, as required by the Miller Act, 40 U.S.C. Sec. 270a, 49 Stat. 793. (Complaint Tr. 3).

The jurisdiction of the District Court was conferred by Title 40 U.S.C., Sec. 270b, 49 Stat. 794, creating a cause of action in favor of laborers and materialmen upon a payment bond furnished to the federal government, and Title 28 U.S.C., Sec. 1352, 62 Stat. 934, conferring on federal district courts jurisdiction of actions on bonds executed under the laws of the United States. The District Court also had jurisdiction of this action under Title 28 U.S.C., Sec. 1345, 62 Stat. 933, conferring jurisdiction of actions commenced by the United States; under Title 28 U.S.C., Sec. 1331, 62 Stat. 930, conferring jurisdiction where the matter in controversy ex-

ceeds \$3,000.00 and arises under the laws of the United States; and under Title 28 U.S.C., Sec. 1332, 62 Stat. 930, conferring jurisdiction of civil actions where the matter in controversy exceeds \$3,000.00 and is between citizens of different states. The jurisdictional facts appear in the Complaint (Tr. 3-9).

The jurisdiction of this Court to review the judgment of the District Court is conferred by Title 28 U.S.C., Sections 1291 and 1294, 62 Stat. 929 and 930.

STATEMENT OF THE CASE

The use-appellant in this Court, use-plaintiff in the court below, Westinghouse Electric Supply Company, hereinafter called Westinghouse, is a corporation organized under the laws of the State of Delaware and at all times herein mentioned was authorized to do business in the State of Washington, (Finding of Fact I, Tr. 13-14).

Defendant, John V. Ahearn, Sr., hereinafter called Ahearn, is a resident of Washington, doing business under the firm name and style of Ahearn Electric Co. in Bremerton, which is in the Western District of the State of Washington, Northern Division. Defendant, The Aetna Casualty & Surety Company, hereinafter called Aetna, is a corporation organized under the laws of the State of Connecticut and is authorized to do business in the

State of Washington. (Finding of Fact I, Tr. 14).

The complaint alleged an express contract between Westinghouse and Ahearn for the purchase by the latter of certain latex telephone cable (Paragraph IV, Tr. 5-6), and claimed a balance due thereon of \$5,469.51, with interest thereon (Par. V, Tr. 6) plus reasonable attorneys' fees and costs. The answer denied the existence of the contract, and denied any indebtedness to the plaintiff (Par. III and IV, Tr. 8-9).

The evidence is reviewed in detail with record references below. For the convenience of the Court, the contentions of the parties are summarized as follows: The evidence introduced by Westinghouse, if believed, tended to show that an express contract had been made between Westinghouse and Ahearn for the purchase of certain paper wrapped telephone cable to be delivered in the third quarter of 1953; that delivery of the paper wrapped cable could not be had in time for Ahearn to perform his contract with the Federal Government; that Ahearn had then ordered latex cable which could be delivered one year earlier; that latex cable was delivered and utilized by Ahearn in the performance of the government contract with knowledge of the increased price thereof; and that Ahearn paid only the amount he thought the paper wrapped cable should have cost, leaving a balance due of \$5,469.51, being

the difference between the price of the paper wrapped and latex cable in the quantity delivered.

The defendants' evidence, if believed, tended to show that Ahearn ordered paper wrapped cable but had never ordered the latex cable; that he had been orally promised by a Westinghouse employee that the paper wrapped cable would be delivered in time for him to perform his government contract approximately one year earlier than the date of delivery shown by a written estimate of Westinghouse and a later letter from Westinghouse which confirmed the same delivery date for paper wrapped cable as specified in the written estimate; that he had received and used the latex cable in the prosecution of work under his government contract, but had never admitted his liability therefor.

The District Judge found the evidence conflicting and that the plaintiff had not sustained its burden of proving an express contract for the supply of latex cable (Finding of Fact XI, Tr. 22-3). This finding is not attacked on appeal due to conflicting testimony. Rather, appellant contends that upon the following undisputed facts, there was established an implied contract for the purchase of latex cable:

- (1) That the latex cable was received and accepted by the defendant Ahearn, he having possession about three weeks before using the same;

(2) With knowledge of the price which Westinghouse placed thereon by an invoice received by Ahearn before the delivery of the cable;

(3) Which price represented its reasonable value, being its cost to Westinghouse plus a 5% commission.

Appellant's position is that the foregoing circumstances establish the existence of a contract implied-in-fact to pay the reasonable value of the latex cable, and that, in addition, defendant Ahearn received benefit from his receipt and use of the latex cable, giving rise to a contract implied-in-law.

It is the further contention of appellant that having proven that it had "furnished material in the prosecution of the work" under the government contract, and not having been paid in full therefor, it became entitled, under Title 40 U.S.C. Section 270 b, 49 Stat. 794, to recover the balance due thereon.

A detailed summary of the evidence follows:

Some time prior to January 30, 1952, the federal government acting through the Navy Department, issued Specification No. 30338 for the performance of certain electrical repairs at the Puget Sound Naval Shipyard, Bremerton. (Def. Ex. A-3). Bids were required to be submitted in Seattle, Washington, on February 1, 1952 at 2 P. M. (Ahearn Tr. 146). Section 5.09 of this Specification provided in part as follows with reference to telephone cable

(Def. Ex. A-3):

"Telephone cable shall be 6, 26 and 51 pair, No. 19 AWG solid annealed bare copper with single wrap dry paper or .015 latex insulation, twisted pairs, cable pairs, string binder, five tapes for paper belt or rubber fill tape, and lead sheath."

On January 31, 1952, plaintiff's employee, George F. Schindler, at the request of Ahearn's foreman Rockwell, prepared a quotation for supplying materials required in the performance of his Navy contract. Rockwell requested a quotation on paper wrapped cable alone, as the cost of latex cable was several times the cost of paper wrapped cable (Rockwell, Tr. 131-2). This quotation was received in evidence as Pl. Exhibit 3. With reference to the supplying of telephone cable which forms the subject matter of this suit, Ex. 3 provides as follows:

"Approx. 1500'	Telephone Cable, 6 pair, 19 ga. paper wrapped, lead covered, Western Electric Type ENB 16.50C'
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"Approx. 1500'	Ditto except 26 pair	37.90C'
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"Approx. 1500'	Ditto except 51 pair	61.20C'
-------------------	----------------------	---------

Shipment - Telephone Cable - 3rd
Quarter. 1953 Prices billed will be
those in effect at time of shipment.

Orders on Telephone Cable should be
placed direct with Graybar Electric
Company, Seattle."

The testimony of plaintiff's employee, Schindler, was that he telephoned the information from the quotation to someone at the Ahearn Electric Co., on January 31, 1952. He then placed it in the mail addressed to the Ahearn Electric Co. on the following day. (Schindler, Tr. 33). Defendant Ahearn testified that the quotation was delivered to him by plaintiff's salesman Merritt Upson on January 31, 1952 at his place of business in Bremerton (Ahearn Tr. 147-150) and that Upson then assured him in the presence of Mrs. Ahearn and Arthur Rockwell, Ahearn's foreman at that time, that the paper-wrapped cable could be delivered in time for Ahearn to complete the Navy contract by August, 1952, in contradiction to the written terms of the Westinghouse quotation, Exhibit 3, which specified third quarter 1953. On redirect examination, Upson testified that he had been in Port Angeles, Washington on January 30 and 31 of 1952; that he had spent the night of January 30 there, and that he had returned from Port Angeles to Seattle via a route which did not go through Bremerton, on the afternoon of January 31, to take three guests from Port Angeles to a Westinghouse demonstration that evening. He denied that he had been in the defendant Ahearn's place of business on January 31, or that he had presented Exhibit 3 to Ahearn and denied on cross-examination that he had discussed

the Navy Yard job with Ahearn prior to the time of Ahearn's bid, in person or by telephone (Upson, Tr. 202-208). Previously when Upson's pre-trial deposition was taken he had testified he did not remember whether the specifications were mailed or delivered to Ahearn, (Upson, Tr. 207-208), but at that time he did not have his daily records and expense account with him. Upson's running daily expense account and his monthly expense statement covering the period January 30-31, 1952, were received in evidence as Plaintiff's Exhibits 21 and 22. Attached thereto was a receipted bill for his hotel expense at Port Angeles the night of January 30. Ahearn's foreman on the Navy Yard job, Arthur Rockwell, examined as a witness for the plaintiff, testified that he had requested the Westinghouse quotation from Mr. Schindler of Westinghouse, and that it had been received in the mail, rather than delivered in person (Rockwell, Tr. 131-2).

Defendant Ahearn was the successful bidder on the Navy Yard job (Finding of Fact VI, Tr. 17), and was awarded the government contract (Contract No. NOY 29688), a copy of which was received in evidence as plaintiff's Exhibit 18 (Finding of Fact III, Tr. 14-15). In conjunction with the award of the contract, there was furnished to the United States of America by Ahearn as principal and by Aetna as surety, under date of February 8,

1952, a payment bond in the sum of \$29,069.43, conditioned on payment by the principal to all persons supplying labor and materials for the performance of the contract. (Finding of Fact III, Tr. 15).

On February 5, 1952, an order was taken by plaintiff's salesman Upson from defendant for electrical materials required for the Navy Yard job, covered by the quotation, plaintiff's Exhibit 3, at Ahearn's place of business in Bremerton (Finding of Fact VI, Tr. 17-18). This order, signed by Ahearn, is in evidence as plaintiff's Exhibit 4, and with reference to telephone cable, specified as follows:

"1900' 6 pr. 19 Ga. Paper wrapped Lead covered	
Western Electric Type	
E. N. B. Wire	\$16.50C
1700' 26 pr. Ditto	37.90C
1100' 51 pr. Ditto One piece	61.20C"

The order does not refer to delivery dates, either of telephone cable or of other materials. It contains no reference to latex covered cable.

Exhibit 4 was rewritten in the Westinghouse office and a copy of the rewrite was received in evidence as Pl. Ex. 5. Plaintiff's salesman Upson testified that he mailed a copy of Exhibit 5 to Ahearn, but no copy thereof was produced by Ahearn at his pre-trial deposition, or at the trial, in response to a subpoena therefor. (Tr. 37).

Thereafter, on February 19, 1952, salesman Upson wrote and personally delivered to Ahearn (Upson, Tr. 38), a letter advising of approximate delivery dates on material for the Navy Yard job. This letter was received in evidence as plaintiff's Exhibit 6. With reference to telephone cable, it stated the following:

"Western Electric Telephone Wire 6 pr., 26 pr. & 51 pr. paper and sheath—3Q53.

"U. S. Rubber Latex Telephone Wire 6 pr., 26 pr. and 51 pr.—3Q52.

U. S. Rubber take exception to sub paragraph "B" under Paragraph 5-09 in that Mutual capacitance of their wire is .115 MFD instead of .090 as specified."

which confirmed the delivery date of paper wrapped telephone cable set forth in the Westinghouse Quotation (Pl. Ex. 3), that is 3rd Quarter 1953, but stated that latex cable could be delivered in 3rd Quarter 1952. Ahearn's attention was called to that fact but he paid no attention to the delivery dates of the different types of cable. (Ahearn, Tr. 181). In 1952 all copper wire was under government priority and there was a more acute shortage of paper wrapped cable than Latex cable. (Flechsigs, Tr. 85-86).

On this same day, Ahearn wrote a letter to the Navy officials administering the contract. This letter is in evidence as plaintiff's Exhibit 8. It for-

warded the Westinghouse letter, (Pl. Exhibit 6), to the Navy to advise Navy officials of the information on delivery dates (Ahearn, Tr. 182). The Navy's reply thereto, dated March 7, 1952, is in evidence as Pl. Exhibit 9. It authorized the use of U. S. Rubber latex telephone wire of the characteristics set forth in Exhibit 6, which could be delivered in the third quarter of 1952.

Three days later, on March 10, 1952, plaintiff's salesman, Upson, called on Ahearn at his shop in Bremerton (Upson, Tr. 43; Ahearn Tr. 154-155). The testimony as to what transpired on that date is in sharp conflict. Upson testified that he went to Ahearn's office in company with Novich, another Westinghouse employee, at which time he discussed with Ahearn and Arthur Rockwell, Ahearn's foreman, the fact that the paper wrapped cable could not be delivered until the third quarter, 1953, whereas the latex could be delivered in the third quarter of 1952. The existence in Ahearn's Navy contract, (Pl. Exhibit 18) of a liquidated damages clause fixing damages of \$40.00 a day was also discussed. Upson then left Ahearn's shop in company with Rockwell for a cup of coffee, and then returned without Rockwell, at which time Ahearn said: "let's get the wire," having previously been advised of the difference in price of roughly \$5,000.00. Upson testified that at the time Ahearn

made the statement: "let's get the wire," Novich was also present. (Upson, Tr. 43-48). Upson also testified, (Tr. 46), that at this time Ahearn changed the quantities of the different pair of wire due to changes on the job, ordering:

1800' of 6 pair latex cable
1900' of 26 pair latex cable
1250' of 51 pair latex cable

Novich testified to the same discussions and statements referred to by Upson regarding the ordering of latex cable and fixed the date of the conversation as March 10, 1949, by the fact that he received an order for certain lighting fixtures in Bremerton on that date (Novich, Tr. 91-94, and Def's. Ex. A-1). Mr. Lawrence Blackman, who worked for Ahearn during the period of the Navy Yard job, was examined as a witness for plaintiff. He testified to having been in the shop at a time when he heard Ahearn order latex covered wire from Upson, and identified Pl. Ex. 10 as an order which Upson started to write out at that time. He stated that he had seen a copy of Exhibit 10 in Mr. Ahearn's file (Blackman, Tr. 102-108). On cross-examination, defendants introduced Blackman's time book (Defendant's Exhibit A-2) which showed that on March 10, Blackman's time had been charged to the Navy Yard job. (Blackman, Tr. 123). Blackman testified that the time book would

show a charge to the Navy Yard job for certain work performed in the shop. (Blackman, Tr. 124-125). Ahearn testified that no work for the Navy Yard job was done in his shop and that defendant's Exhibit A-2 indicated that Blackman had been in the Navy Yard eight hours on March 10, 1952 (Ahearn, Tr. 153-154).

With reference to March 10, 1952, Ahearn testified that Upson and Novich came to his shop on that day at his request to estimate the materials for lighting a nearby grocery, and that he and Novich had checked the store's lighting needs and figured the cost of the lights and labor, (Ahearn, Tr. 154-157). Ahearn stated that there was no discussion relating either to a change from paper wrapped to latex telephone cable, (Ahearn, Tr. 159), or to a change in the lengths of the 3 types of cable, or to the contract involved in this suit. (Ahearn, Tr. 158). Mrs. Ahearn testified that she was in the shop on March 10, 1952, as indicated by entries in her handwriting in defendant Ahearn's cash journal (defendant's Exhibit A-8, Tr. 196-198) and that she heard no comment with reference to latex wire when Upson and Novich were in the store on that day. (Mrs. Ahearn, Tr. 201).

The testimony as to the remaining events is not in serious dispute.

On the afternoon of March 10, 1952, Upson wrote

up in long hand an order for latex telephone cable and on March 10th or 11th (Pl. Exhibit 10) personally mailed a copy to Ahearn (Upson, Tr. 44-48). Upson's copy of this order was received in evidence as plaintiff's Exhibit 10. On March 11, 1952, Westinghouse ordered latex cable from the local agency of the manufacturer, U. S. Rubber. The order was accepted by the factory on March 24, 1952. (Testimony of Mr. A. J. Flechsig, plaintiff's sales supervisor, Tr. 66).

On December 24, 1952 U. S. Rubber invoiced Westinghouse for the shipment of latex telephone cable to Ahearn Electric Company. The invoice showed shipment as having been made on December 20, 1952 (Pl. Ex. 15). On December 30, 1952, Westinghouse invoiced the latex telephone cable to defendant Ahearn. This invoice is in evidence as plaintiff's Exhibit 16.

Ahearn testified that he received Exhibit 16, probably on December 31, 1952 and that he had never prior to the receipt of that invoice discussed with Upson or any other employee of Westinghouse the substitution of latex for paper wrapped cable. (Ahearn, Tr. 160-161).

The latex cable was delivered to Ahearn on the job site at Puget Sound Naval Shipyard in January, 1953 (Finding of Fact IX, Tr. 19). Westinghouse's supervisor, Mr. Flechsig, testified that from in-

formation he had received, the date of delivery should have been January 6, 1952 (Flechsigs, Tr. 67).

On receipt of Exhibit 16, the invoice for latex cable, showing a price of \$7,646.29 in lieu of the price which Ahearn testified he had expected to pay for paper wrapped cable, approximately \$1800.-00, Ahearn called Rockwell and Rockwell called Flechsigs of Westinghouse (Ahearn, Tr. 162). As a result of that call, Upson came to Ahearn's place of business. Ahearn testified that he denied having ordered latex wire and that Upson asserted that Ahearn had ordered the wire. Ahearn stated that he would refuse to accept the wire. (Ahearn, Tr. 186). Ahearn testified that Upson suggested that Ahearn request a price increase on his contract. (Ahearn, Tr. 164-5). Thereafter, Ahearn addressed a letter, (Pl. Exhibit 20) to the Naval authorities supervising the government contract. This letter, dated January 8, 1953, informed the Navy that the telephone cable had been received but that it was not the type ordered for the contract, and requested an increase in the contract price to cover the difference between paper wrapped and latex cable.

The Navy reply thereto dated January 26, 1953, is in evidence as plaintiff's Exhibit 20 (a). It denied any increase in the contract price and points out that Section 5.09 of Specification No. 30338 (Defendants' Exhibit A-3) called for either paper

wrapped or latex insulated telephone cable. It went on to refer to previous correspondence, (Pl. Exhibits 6 and 8) in this case, as follows:

“Your letter further states that the material actually supplied by Westinghouse was not the material ordered. The Officer-in-Charge of Construction has on file a letter dated 19 February 1952 from your firm, which submitted a letter from Westinghouse Electric Supply Company dated 19 February, showing approximate delivery dates on material ordered for the subject contract. Several items have been covered in their letter and one of the items was the telephone cable in question, and that part is hereby quoted: ‘U. S. Rubber latex telephone wire 6 pr., 26 pr. and 51 pr.—3Q52. U. S. Rubber take exception to subparagraph ‘“b”’ under paragraph 5-09—that the Mutual capacitance of their wire is .115 MFD instead of .090 as specified’.”

The Navy letter went on to state that the contract completion date was then 28 October 1952, that consideration would be given to extending the contract completion date on the basis of delay in delivery of the material then on the job site, but that the liquidated damages provision of the contract would be invoked in the event of any further delay. It requested Ahearn to install the specified materials and complete the contract at the earliest possible date.

Prior to the time the telephone cable was finally installed, Ahearn filed a document with the Navy to obtain an advance of 90% on the value of the

material then located on the job site. This estimate document listed the price of the telephone cable as \$7,500.00. Ahearn received advance payment from the Navy based on that price (Rockwell, Tr. 137-138; Ahearn, Tr. 182-3).

The latex telephone cable was thereafter installed by Ahearn and Rockwell (Rockwell, Tr. 136-7). (Finding of Fact IX, Tr. 19-20). Ahearn testified that between February 5, 1952 when paper wrapped cable was ordered (Pl. Exhibit 4) and when latex cable was delivered to him in early January, 1953 he had no discussions at all with his foreman Rockwell about the cable (Ahearn Tr. 185).

Ahearn and his counsel were served with subpoena duces tecum to produce at the trial all of his records, invoices, letters and other documents in any way pertaining to the subject matter of the law suit. He was able to produce only 8 out of 18 of the yellow sheet acknowledgements of orders (Pl. Exhibit 14) (Flechsigs, Tr. 208-209) which Westinghouse mailed to him at the time each order was received. One of the ten missing is the acknowledgment covering the latex cable.

SPECIFICATIONS OF ERROR

1. The District Court was clearly erroneous in finding and concluding that plaintiff was not entitled to recover on the theory of implied contract

(Finding of Fact No. XI, Tr. 23; Conclusion No. I, Tr. 24), for the reason that the evidence established the existence of a contract implied-in-fact.

2. The District Court was clearly erroneous in finding that defendant Ahearn did not benefit by his receipt and use of latex cable (Finding of Fact No. X.), and in finding and concluding that plaintiff was not entitled to recover on the theory of implied contract (Finding of Fact No. XI, Tr. 23; Conclusion No. I, Tr. 24), for the reason that the evidence established a contract implied-in-law.

3. The District Court erred in concluding that the complaint should be dismissed with prejudice (Conclusion No. II, Tr. 24) and entering judgment dismissing the complaint with prejudice (Tr. 25), for the reason that the uncontradicted evidence established the existence of all the facts entitling the plaintiff to recover under the statute, Title 40 U.S.C., Sec. 270b, 49 Stat. 794.

4. The District Court erred in concluding that the complaint should be dismissed with prejudice, Conclusion No. II, Tr. 24, and entering judgment dismissing the complaint with prejudice (Tr. 25).

5. The District Court erred in not entering judgment for the plaintiff for the principal sum of \$5,469.51, with interest from January 1, 1953, its costs, and a reasonable attorney's fee of \$1,500, as prayed for in the plaintiff's complaint, as amended.

I. THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT THERE WAS NO CON- TRACT IMPLIED-IN-FACT FOR THE PURCHASE OF LATEX CABLE

Summary of Argument

The evidence is undisputed that Ahearn received the latex cable with knowledge of the price thereof and used the cable in the performance of his contract with the federal government. Under the law of Washington which controls the transaction between Westinghouse and Ahearn, these circumstances give rise to a contract implied-in-fact.

Argument

1. *The transaction between Ahearn and Westinghouse is governed by the law of the State of Washington.*

In *Continental Casualty Co. v. Schaefer*, 173 F. 2d 5 (9th Cir. 1949), cert. den. 338 U. S. 820, 94 L. Ed. 479, 70 Sup. Ct. 35 (1949), this Court held that the liability of a contractor for labor and materials furnished in the performance of a federal contract in the State of Washington in a Miller Act suit, was governed by Washington law, although jurisdiction was conferred by the Miller Act rather than by diversity of citizenship. The court said at p. 8:

“* * * we should decide this issue as would a State court sitting in Washington. Since all the relevant facts regarding this subcontract

have occurred in Washington, the Washington substantive law of contracts is applicable."

See also *United States v. Henke Construction Co.*, 157 F. 2d 13 (C. C. A. 8, 1946).

2. Acceptance and use of goods with knowledge of the price thereof gives rise to an implied contract to pay that price under Washington law.

The defendants have contended throughout that there was no express contract for the purchase of latex telephone cable from Westinghouse by Ahearn, and the District Court so found. (Finding of Fact No. XI, Tr. 22-3.) That being the case, the defendants' position must be that Ahearn may receive, retain and use the latex cable, with knowledge of its price and value, without paying such price. Under Washington law, it is clear that he may not do so but that such dealings give rise to a contract implied-in-fact.

Mutual Sales Agency v. Hori, 145 Wash. 236, 259 Pac. 712 (1927), is very similar to the instant case in many respects. In that case there was a misunderstanding between seller and buyer as to the price and grade of potatoes ordered from the former by the latter. The court assumed that the buyer was correct in his contention that a contract had been formed for the sale of the lower grade of potatoes at a lesser price, but held that where the higher

grade was accepted and retained by the buyer with knowledge that the seller was demanding the higher price, the buyer could not accept the potatoes, obtain possession of them by paying the sight draft attached to the bill of lading and then recover back the difference between the price asserted by it and the price invoiced by the seller and actually paid. This case is cited in 1 *Williston on Sales* (Rev. Ed.), Sec. 5 (a), p. 10, for the following proposition:

“Accepting the property in goods with knowledge that they are offered at a certain price indicates a promise to pay that price.”

In *Cuschner v. Pittsburgh-Hickson Co.*, 91 Wash. 371, 157 Pac. 879 (1916) the buyer brought an action to recover damages for an alleged breach of contract by the seller. One of the claims sued upon was to recover money paid for goods shipped and paid for, but not ordered by the buyer. In disposing of this claim the Washington Supreme Court said, at p. 373:

“Before the appellant can recover for the goods claimed to have been received but not ordered, it is necessary for him to show that, within a reasonable time after the receipt of such goods, he rejected the same, and so notified the respondent. The evidence fails to show any such notice. On the other hand, there is evidence that at least goods of this class to the extent of \$50 were sold out of the appellant's store by one of his salesmen. This was an act of ownership on the part of the purchaser which would be inconsistent with the right of

ownership on the part of the seller, and would constitute an acceptance of the merchandise, even though not ordered."

It should be noted that in both of the above cases, the buyer had to pay the seller's price to obtain the goods, and was suing to recover back part of the amount so paid. In the instant case, the buyer, Ahearn, did not have to pay to obtain the goods because the goods shipped to him for the prosecution of his government contract were carried by Westinghouse on a "job account," the ledger sheet on which is in evidence as Plaintiff's Ex. 17. Under the terms of this account, Ahearn had ninety days in which to pay Westinghouse after being paid by the government (Ahearn, Tr. 150). Can it be doubted that Westinghouse was relying on the protection of the Miller Act, and the bond of Ahearn and Aetna, in permitting Ahearn to take possession of the goods?

In *Koths v. Shagren*, 38 Wn. (2d) 52, 227 P. (2d) 446 (1951), the seller's assignee brought suit for the invoice price of groceries furnished to the defendant, alleging an express contract to pay such invoice price. There was no evidence of any express promise or agreement by the buyer to pay nor was there evidence as to the market or reasonable value of the goods. The Washington Supreme Court held that one alleging an express contract could recover on a showing of the foregoing facts establishing the ex-

istence of an implied contract and further, that when a buyer receives goods with knowledge of the price demanded by the seller, he is bound to pay that price, stating at p. 54:

“This is because the price given represents that at which the seller is willing to sell and the acceptance of the goods without protest implies willingness to buy at that price.”

Textual authorities are in accord with the propositions established in these Washington cases. In 1 *Williston On Contracts* (Rev. Ed.), Sec. 36A, pp. 96-97, the following statement is made with reference to offers implied in fact:

“A seller may make an offer of goods which is accepted by taking them with knowledge that payment is expected, or a request for goods may imply a promise to pay for them, which is accepted by delivering them. Similarly, *if goods of a different sort from those ordered are sent by a seller, he thereby impliedly makes an offer to sell which is accepted if the buyer takes the goods.*” (Emphasis supplied)

Defendants' answer in the court below to plaintiff's proof of a contract implied-in-fact was a reference to the Washington case of *Ross v. Raymer*, 32 Wn. (2d) 128, 201 P. (2d) 129 (1948), which holds that in order to permit a recovery on the theory of a contract implied-in-fact for services rendered to a deceased in a suit against her executrix, it must appear that the services were rendered un-

der circumstances indicating that the person rendering them did so with the expectation of being paid and that the decedent expected or should have expected to pay for them. Plaintiff has no quarrel with this proposition. Defendants argue therefrom that because Ahearn consistently maintained that he would not pay for the latex cable, he never became a party to an implied-in-fact contract. We think the cases previously cited are a sufficient answer to this argument. However, attention is also invitted to the case of *Western Asphalt Co. v. Valle*, 25 Wn. (2d) 428, 171 P. (2d) 159 (1946), in which it was held that a subcontractor furnishing an estimate for a part of the work to a prime contractor bidding on a government contract was entitled to go to the jury on the theory of a contract implied-in-fact to pay the reasonable value of the plaintiff's services in preparing the estimate, although the entire evidence on behalf of the principal contractor was that it never expected or intended to pay for such services.

The law of other jurisdictions is similar. In *Royal Card and Paper Co. v. Dresdner Bank*, 27 F. (2d) 791 (C. C. A. 2, 1928) plaintiff-buyer sued a correspondent bank for damages for breach of the buyer's contract with the bank because the bank made payments against the plaintiff's letter of credit on invoices not in conformity with the plaintiff's in-

structions. The invoice price in some instances exceeded the order price, and in other cases goods were invoiced which had not been ordered. It was shown that the plaintiff had accepted and retained the goods shipped and paid for by the defendant bank in violation of the instructions. The Second Circuit Court of Appeals held that by accepting the goods with knowledge of the invoice price and asserting control over them, the plaintiff accepted the new contract. The court said at p. 795:

“Excess shipments and shipments unauthorized in other respects gave plaintiff the privilege of rejection but if it accepted the goods it was obliged to pay the invoice price.”

Viewing the transaction from a Sales aspect, Washington law requires a similar result. Since it is undisputed on this appeal that there was no express contract for the purchase of latex telephone cable, and the cable having been delivered by Westinghouse and accepted and retained by Ahearn, under well-recognized principles of the law of Sales, an implied-in-fact contract arose. In 1 *Williston on Sales* (Rev. Ed.), Sec. 5 (a), p. 10, it is stated:

“Accepting the property in goods with knowledge that they are offered at a certain price indicates a promise to pay that price. So that where goods which have not been ordered are sent and the buyer takes the goods, he impliedly agrees to pay for them.”

Sec. 9 of the *Uniform Sales Act* (Laws of Wash.

1925 ex. s. c. 142, Sec. 9, RCW 63.04.100), provides in part, as follows:

“(1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

* * * *

(3) Where the price is not so fixed or determined the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.”

See, e. g., *Estey Organ Co. v. A. & E. Lehman*, 132 Wis. 144, 111 N. W. 1097 (1907); *Mummenhoff v. Randall*, 19 Ind. App. 44, 49 N. S. 40 (App. Ct. 1898); *Peerless Glass Co. v. Pacific Crockery & Tin Ware Co.*, 121 Cal. 641, 54 Pac. 101 (1898).

Where goods are delivered to the buyer without an agreement as to price, the measure of recovery under the Sales Act is the reasonable price. *Chicago Macaroni v. Grossi*, 349 Ill. App. 539, 111 N. E. (2d) 357 (App. Ct. 1953).

II. THE DISTRICT COURT ERRED IN FINDING AND CONCLUDING THAT PLAINTIFF WAS NOT ENTITLED TO RECOVER ON THE THEORY OF A CONTRACT IMPLIED-IN-LAW OR QUASI CONTRACT

Summary of Argument

The District Court found that defendant Ahearn received no benefit from the receipt of latex telephone cable. The uncontradicted evidence establishes substantial benefit to Ahearn from receipt of the cable. His intention not to pay the value thereof does not prevent formation of a quasi contract. Plaintiff was therefore entitled to recover the unpaid balance of the invoice price on the theory of quasi contract or contract implied-in-law.

Argument

1. Ahearn benefited from the receipt and use of the latex telephone cable.

The evidence established without contradiction that subsequent to receipt of the Navy letter of January 26, 1953 (Pl. Ex. 20A) Ahearn completed his government contract by installing latex telephone cable (Rockwell Tr. 135-8). It is the argument of defendants that because the Navy denied Ahearn an increase in his contract price he did not benefit from the receipt of the latex cable, and the District

Court so found. (Finding of Fact No. X, Tr. 20.) This finding is clearly erroneous.

Plaintiff does not dispute that defendant Ahearn would have received the same payment under his government contract for paper-wrapped cable if that had been available to him at the time the latex cable was delivered. In fact, the use of either was authorized. It is clear, however, that Ahearn had no contract right to receive paper-wrapped cable at that time; and it is equally clear that paper-wrapped cable would not have been available to him until at least the third quarter of 1953 from any source. The receipt of the latex cable enabled him to complete his government contract and receive payment therefor, and was of benefit to him beyond any possibility of question.

The only evidence in this record as to the availability of paper-wrapped cable is contained in plaintiff's Exhibits 3 and 6, and shows that it would not have been available until the third quarter of 1953. Mr. Flechsig testified that manufacturers were not permitted to maintain stocks. (Flechsig, Tr. 78.) Ahearn testified that Upson had told him he could get it in time for Ahearn to perform his contract but that statement was denied by Upson. If Ahearn had not accepted and used the latex telephone cable, plaintiff's Exhibit 20A shows that Ahearn would have been exposed to liquidated damages under his

government contract at the rate of \$40.00 per day for whatever time it took him to obtain paper-wrapped cable. It is difficult to conceive how, under the foregoing facts, it can be maintained that Ahearn received no benefit.

In addition, although Ahearn's total government contract price was not increased, he benefited from receiving approximately 90% of the price of the latex in advance of completing the work, when he claimed and received an estimate payment based on the invoice price of the latex. (Ahearn, Tr. 182-3.)

Moreover, the mere receipt and use of the latex cable, which he had no express contract to receive, constituted a benefit, disregarding the fact that it enabled him to complete and receive payment under his government contract. *Restatement of the Law of Restitution*, Sec. 1b, under the heading "What Constitutes a Benefit," defines "benefit" as follows:

"A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss."

In *Mutual Sales Agency v. Hori*, 145 Wash. 236, 259 Pac. 712 (1927) (discussed under Argument No.

I, supra), the buyer argued that it was under compulsion to pay the price demanded by the seller for higher grade potatoes because it had resold them prior to arrival and then was forced to take the goods to make good its contracts of sale for the lesser grade. There was no showing that it received a greater price from the resale of the higher grade potatoes. The Washington Supreme Court held that that circumstance did not relieve it from the consequence of its act in accepting and retaining the goods.

Great Lakes Construction Co. v. Republic Creosoting Co., 139 F. (2d) 456 (C. C. A. 8, 1943), a case under the Heard Act, former Title 40 U. S. C. Sec. 270, is remarkably similar to the instant case in this respect. That was a suit by a subcontractor against the prime contractor and the surety on his bond. There was originally a contract between the contractor and the subcontractor for the performance of the work of flooring a building being constructed for the government. The prime contractor failed to have the building ready for the flooring work within the time required by the subcontract and the subcontractor therefore claimed that it was released from the obligation of performing under its contract. The prime contractor insisted that the contract was still in existence and that the subcontractor was required to perform for the contract

price. The prime contractor undertook the work itself, insisting on his right to hold the subcontractor for the excess cost thereof. After performing a part of the work the prime contractor discontinued work on the flooring and the work was taken over and completed by the subcontractor. At that time both parties were still insisting upon their positions, the prime contractor that the subcontractor was still obligated to perform for the original contract price, and the subcontractor that the original contract had been breached because of failure to provide a site at the time agreed upon, and the purpose of the subcontractor's assuming performance was to diminish the amount in controversy and reserve the rights of the parties for future adjudication. The court held the conduct of the parties after such breach to have amounted to an abandonment of the original contract,

“* * * and that the Republic Creosoting Company, having furnished material and labor which was accepted and received by the Great Lakes Construction Company and used and employed in the United States Post Office, is entitled to have and recover in quantum meruit the reasonable value of such labor and material at the time the same was furnished, together with interest at 6% per annum from the date of the filing of its intervening petition in this action.” (139 F. (2d) at p. 464)

The Appellate Court further found:

“* * * the acceptance of the work and material furnished by Republic upon the understanding

detailed in the findings justified and required the recovery upon the quantum meruit which was awarded." (p. 464)

2. *Defendant Ahearn's refusal to pay does not prevent formation of a quasi contract under Washington law.*

The Washington law of contracts implied-in-law or quasi contract was exhaustively reviewed in the case of *Chandler v. Wash. Toll Bridge Authority*, 17 Wn. (2d) 591, 137 P. (2d) 97 (1943). The court there defined a contract implied in law as follows, citing a prior Washington decision:

"A contract implied in law is an obligation imposed upon a person by the law, not in pursuance of his intention and agreement, either express or implied, but found against his will and design, because the circumstances between the parties are such as to render it just that one should have a right and the other a corresponding liability similar to that which would arise from a contract between them. This kind of obligation rests upon the principle that whatsoever it is certain a man ought to do, that the law will suppose him to have promised to do." (pp. 600-601)

No reason has been suggested why as between plaintiff and defendants, defendants should be relieved of the liability to pay the reasonable value of the goods which Ahearn received, retained and used in the performance of his contract with the government. It is nowhere contended in this record that the Westinghouse invoice for the latex cable

was greater than its reasonable or market value. Ahearn himself testified that he knew latex cable cost about three times as much as paper-wrapped cable (Ahearn, Tr. 180). Rockwell testified that he never considered latex cable for the job because of the price thereof (Tr. 132). Plaintiff's Exhibit 15, showing the cost of the latex cable taken together with its invoice to Ahearn (Pl. Ex. 16) shows that its mark-up over the manufacturer's price was only 5%.

III. ALL FACTS REQUIRED TO ENTITLE PLAINTIFF TO RECOVER UNDER THE MILLER ACT (TITLE 40, U.S.C., SEC. 270 b) WERE ESTABLISHED BY THE UNDISPUTED EVIDENCE

Summary of Argument

The Miller Act does not require a laborer or materialman to prove a contract, in the conventional sense, to recover on the prime contractor's payment bond. All that is required is proof that the use-plaintiff has furnished work or materials in the prosecution of the work, and has not been paid therefor.

Argument

In defining the rights it confers, the Miller Act does not require a laborer or materialman to prove a contract in order to recover. Sec. 2 (a) of the Act provides as follows: (Title 40 U. S. C. Sec. 270b (a)):

"Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of

institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: PROVIDED, HOWEVER, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor * * *"

Moreover, the payment bond furnished by Aetna and Ahearn (Pl. Ex. 18) was conditioned that:

"If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, . . . then this obligation to be void; otherwise to remain in full force and virtue."

Thus, it may be seen that the Act protects not those who contract with the prime contractor, but those who *furnish* labor and materials in the prosecution of the work, with the further proviso that those having a contractual relationship with a subcontractor must give notice within ninety days, so that the prime contractor may be protected in making full payment to his subcontractors after that time.

In *MacEvoy v. United States*, 322 U. S. 102, 88 L. Ed. 1163, 64 Sup. Ct. 890 (1944), the Supreme Court defined those protected by the Miller Act as being of two classes:

“(1) those materialmen, laborers and sub-contractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor.” (322 U. S. at 107-8)

In that case, the use-plaintiff had supplied material to a materialman who dealt with the prime contractor. The Circuit Court held the plaintiff entitled to recover under the first portion of the section. *United States v. MacEvoy*, 137 F. (2d) 565 (3d Cir. 1943). The Supreme Court held a materialman not to be a subcontractor within the meaning of the proviso of the section, and that therefore the use-plaintiff, having neither “dealt with” the prime contractor, nor had a “contractual relationship” with a subcontractor, could not recover on the bond. 322 U. S. 102, *supra*.

Under the predecessor statute, the Heard Act, former title 40 U. S. C. Sec. 270, 28 Stat. 278 as amended, this Court held an action could be maintained by a materialman on the payment bond against the surety without joining the principal. A District Court order denying the surety’s motion to join the contractor-principal was affirmed. *Seaboard Surety Co. v. United States*, 84 F. (2d) 348 (C. C. A. 9, 1936)

Ross Engineering Co. v. Pace, 153 F. (2d) 35 (C.

C. A. 4, 1946), is closely in point. Here a number of actions were consolidated in one Miller Act proceeding. Case No. 5416, reported therein, beginning at page 43, involved the claim of a sub-subcontractor against the prime contractor for the cost of repairing damage to a road base built by the sub-subcontractor. The complaint alleged an express contract to pay the expense of repair. The Court of Appeals affirmed a jury verdict for the plaintiff, not on the ground of any express agreement, but on the theory that the damage was done by the prime contractor or persons under his control. The Court said:

“It follows that a promise to pay for the benefits conferred should be implied. The situation is akin to that which occurs when one accepts goods or services from another who expects payment for them. It is urged upon us that no intention to pay for the roads can be attributed to Ross in this case in the face of its vigorous denial of all liability.”

See also *Great Lakes Construction Co. v. Republic Creosoting Co.*, 139 F. (2d) 456 (C. C. A. 8, 1943), discussed in Argument No. III, *supra*.

In *Continental Casualty Co. v. Schaefer*, 173 F. (2d) 5 (9th Cir., 1949), a Miller Act case, this Court reviewed the facts and contentions of the parties, a use-plaintiff subcontractor, and the defendants, prime contractor and his surety, and found that the use-plaintiff had furnished labor and materials in the prosecution of the work under the contract, and

had not been paid therefor, which entitled him to recover. This Court said (173 F. (2d) at 8) that it did not matter whether the subcontractor's rights were based on a contract implied-in-fact, a quasi contract, or on promissory estoppel, and it further held the measure of the plaintiff's recovery to be "the reasonable value of the work and materials furnished plus overhead and profit." (173 F. (2d) at 9.)

Appellant does not argue that the Miller Act creates mysterious and unique rights. The statute clearly sets forth the elements which must be shown to entitle a plaintiff to recovery. This Court in *Continental Casualty Co. v. Schaefer*, 173 F. (2d) 5, *supra*, finding the statutory elements to be proven, did not concern itself with the dialectic of whether the plaintiffs' rights sounded in one theory or another. The Court of Appeals for the Fourth Circuit, in *Ross Engineering Co. v. Pace*, 153 F. (2d) 35, (C. C. A. 4, 1946), *supra*, held that a contract implied in law arose on proof by the plaintiff of the elements set forth in the statute.

Here, there is no dispute that the latex cable was furnished in the prosecution of the work (Finding of Fact No. X, Tr. 20), nor that there is a balance of \$5,469.51, which was the difference in price between latex and paper-wrapped cable, unpaid (Pl. Ex. 17) on the invoice price thereof (Pl. Ex. 16).

All facts required to support a judgment under the statute were therefore proven by undisputed evidence, and in fact were not denied at the trial.

IV. THE DISTRICT COURT ERRED IN ENTERING JUDGMENT DISMISSING THE COM- PLAINT WITH PREJUDICE

Summary of Argument

In rationalization of the District Court's judgment, it may be argued that Ahearn had a contract right to receive paper-wrapped cable, and that his damages for breach of that contract would approximate the amount sued for by plaintiff. There was no contract for delivery of paper-wrapped cable in the third quarter of 1952, and the District Court did not find that there was. If there had been, and Ahearn was damaged by a breach of that contract (which was not alleged or proven), that fact would not entitle defendants to a judgment dismissing plaintiff's complaint.

Argument

1. *There was no contract for third quarter 1952 delivery of paper-wrapped cable.*

It is supposed that defendants-appellees will contend that there was a contract for the delivery by Westinghouse to Ahearn of paper-wrapped telephone cable in the third quarter of 1952. The sole evidence to that effect is the testimony of Ahearn himself as to the statements of Upson claimed to have been made on January 31, 1952 (Ahearn, Tr.

149-50). The statement of the case in this brief discusses fully the evidence, oral and documentary (Pl. Ex. 3, 6, 8, 9, 20A, 21 and 22) which rebut this assertion. The District Court did not find that there was a contract for the delivery of paper-wrapped cable before the third quarter, 1953. He found,

“Some one among the witnesses is obviously and knowingly not telling the truth, and I do not know who it is.”

And,

“This Court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff’s burden of proof in support of the cause of action alleged in plaintiff’s complaint.” (Finding of Fact No. XI, Tr. 20, 22-3)

Discarding the evidence on behalf of Westinghouse that Ahearn ordered the latex cable, the situation at the time Ahearn learned of the delivery of the latex cable, and its invoice price, was that there was a contract for third quarter 1953 delivery of paper-wrapped cable (which contract has been abandoned by the parties), or else, taking the most favorable possible view of the evidence from the standpoint of defendants-appellees, there was no contract for paper-wrapped cable, as a result of a mutual mistake of fact as to time for delivery, Ahearn believing he had contracted for third quarter 1952 delivery, and Westinghouse believing it had contracted for third quarter 1953 delivery.

2. *The existence of a contract for delivery of paper-wrapped cable in the third quarter 1952 would not entitle defendants-appellees to judgment in this action.*

Assuming in the face of the overwhelming evidence to the contrary, that Ahearn had a contract right to receive paper-wrapped cable in the third quarter of 1952, that fact would not be a defense to plaintiff's suit. If Westinghouse had breached a contract for delivery of the paper-wrapped cable, it is elementary that Ahearn's remedy would have been an action for damages for breach of that contract. In this action, Ahearn neither pleaded such a contract nor filed a counterclaim, and proved no damages resulting from such breach.

Again the case of *Mutual Sales Agency v. Hori*, 145 Wash. 236, 259 Pac. 712 (1927) (discussed under Argument I(1)) is in point. The Washington Supreme Court there assumed that the seller had breached his contract for delivery of potatoes of a lesser grade and price, but reversed the trial court's judgment permitting the buyer to recover the difference in price between the two grades of potatoes, because the buyer had not sued for breach of the contract for the cheaper grade of potatoes. (145 Wash., 240-241)

V. THE DISTRICT COURT ERRED IN NOT ENTERING JUDGMENT FOR PLAINTIFF

Summary of Agreement

Plaintiff having established by uncontradicted evidence its right to recover in this action, the District Court should have entered judgment granting the relief prayed for.

Argument

Having proven the existence of a contract implied-in-fact (Argument No. I) plaintiff was entitled to recover the balance due on the invoice price of the latex cable, which balance is shown by Plaintiff's Exhibit 17, and is not denied by defendants. If plaintiff's right to recover is held to rest in quasi-contract (Argument No. II), or on proof of the facts required to recover under the Miller Act (Argument No. III), then the invoice price was shown to be the reasonable value of the cable. Rockwell testified he knew latex cable was over \$5,000.00 more expensive than paper-wrapped (Rockwell, Tr. 134). Ahearn testified he knew latex cost three times as much as paper-wrapped (Ahearn, Tr. 180). Westinghouse's markup over the manufacturer's price was only 5%. (Pl. Ex. 15 and 16.)

Plaintiff was also entitled to interest from January 1, 1953, at the rate of 6%. The plaintiff in a Miller Act suit is entitled to interest on the price of his

labor or materials, if the state in which the labor or materials were furnished accords a right to interest in such an instance. *Continental Casualty Co. v. Boyd*, 140 F. (2d) 115 (C. C. A. 10, 1944); *United States v. Henke Construction Co.*, 157 F. (2d) 13 (C. C. A. 8, 1946). The statutes of Washington provide for interest at the rate of 6% on liquidated demands where no other rate has been fixed between the parties. L. Wash. 1899, C. 80, Sec. 1, R.C.W. 19.52.010.

The expense of obtaining certified copies of the contract and bond, in the amount of \$7.00 (Pl. Ex. 19) is recoverable as a necessary and reasonable expense.

Plaintiff is also entitled to recover a reasonable attorney's fee in this action. The Miller Act was intended to afford those furnishing labor and materials for the prosecution of government work protection analagous to state mechanics' and materialmen's lien statutes in the case of private construction. *United States v. Gibson*, 192 F. (2d) 999, (4th Cir., 1951). Where the local statute provides for attorney's fees in a materialmen's lien foreclosure, attorney's fees are allowed in a Miller Act suit. *United States v. Breeden*, 110 Fed. Supp. 713 (D. C. Alaska, 3d Div., 1953). The Washington statute allows attorney's fees. L. 1893 c. 24, Sec. 12; R.C.W. 60.04.130. The prayer of the complaint, as

amended (Tr. 9-10) is for \$1,500.00 as attorney's fees. It is submitted that this amount is reasonable and proper in a suit to recover the principal sum of \$5,469.51, where the trial consumed three days, and where five lengthy pre-trial depositions were taken. (Documents 10-14, Record on Appeal.)

CONCLUSION

Appellant has analyzed the testimony at length, and has advanced several legal theories entitling it to prevail in this action. What is fundamentally simple has been made to appear complex. Therefore in closing this brief, appellant would like to revert to the basic factual outline of this litigation. Westinghouse shipped latex telephone cable to Ahearn, who received the cable, and an invoice showing its price. There was no contract between them for the sale of latex cable. Ahearn accepted and used the cable, and has paid \$5,469.51 less than the price shown on the invoice. He and his surety now seek to avoid liability for the balance. That is the case.

Respectfully submitted,

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United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, for the use of Westinghouse
Electric Supply Company, a corporation and
all similarly situated, *Appellant,*

vs.

JOHN V. AHEARN, SR., an individual doing business
under the firm name and style of Ahearn Electric
Company and THE AETNA CASUALTY AND
SURETY COMPANY, a corporation,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

ANSWERING BRIEF OF APPELLEES

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United States Court of Appeals

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UNITED STATES OF AMERICA, for the use of
Westinghouse Electric Supply Com-
pany, a corporation and all similarly
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vs.

JOHN V. AHEARN, SR., an individual doing
business under the firm name and style
of Ahearn Electric Company and THE
AETNA CASUALTY AND SURETY COMPANY,
a corporation, *Appellees*.

No. 14537

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

ANSWERING BRIEF OF APPELLEES

RESTATEMENT OF FACTS

At all times material to this action the appellee John B. Ahearn, Sr., was engaged in the electrical contracting business in Bremerton, Washington. Prior to the first day of February, 1952, the United States Navy, through its contracting officer, called for bids in connection with a proposed award for major repairs to the electrical distribution quarters area, Puget Sound Navy Shipyard at Bremerton, Washington (R. 148, Def. Ex. A3). Appellee bid on the work which was re-

quired to be performed, and in general so far as this action is concerned the work to be performed involved not only the furnishing of labor but also the furnishing of materials. The work actually involved repairs and additions to the Navy Yard telephone communications system (Def. Ex. A3, Pl. Ex. 18). The invitation and specifications in connection with the work insofar as telephone cable is concerned, allowed the bidder to bid on the basis of supplying and installing either paper-wrapped telephone cable or latex-covered telephone cable (R. 32).

Appellee Ahearn, who will hereafter be referred to as Ahearn, through his foreman, A. L. Rockwell, contacted the appellant Westinghouse Electric Supply Company, which will hereafter be referred to as Westinghouse, for the purpose of obtaining prices in connection with the electrical materials required to perform the work. Under date of January 31, 1952, Westinghouse supplied to appellee Ahearn a quotation on materials to be used by Ahearn in connection with his bid (R. 31, Pl. Ex. 3). The testimony as to how the quotation was received is in conflict. Appellee Ahearn testified the quotation was delivered personally in Bremerton by the salesman of Westinghouse, one Merritt Upson (R. 147, 148). The testimony of the Westinghouse Company would indicate that the quotation was mailed to Bremerton, with the figures previously phoned by Westinghouse. Of major importance is the fact that the bid opening was at the hour of 2:00 o'clock p.m., February 1, 1952, and it would be necessary for the figures and quotation to be received by appellee Ahearn in time to submit his bid. In

the quotation furnished one type of cable only was mentioned, the paper-wrapped cable, and stated a delivery date in the third quarter of 1953 for the telephone cable. No quotation was requested or given on latex-covered cable (R. 32). The invitation, and contract subsequently entered into, required completion of the contract in August, 1952 (Finding of Fact No. VII, R. 18). In the quotation furnished the following language appears:

“Prices billed will be those in effect at the time of shipment. *Orders on telephone cable should be placed direct with Graybar Electric Company, Seattle.*”

(Pl. Ex. 3, Finding of Fact No. VI, R. 17). Appellee Ahearn was the successful bidder, and his bid and contract were, among other things, for the furnishing and installation of paper-wrapped telephone cable.

Subsequent to the notification of the award, and on February 5, 1952, the salesman of Westinghouse, Merritt Upson, was in the city of Bremerton and took an order from appellee Ahearn direct with the Westinghouse Company for the supplying of paper-wrapped telephone cable as distinguished from requiring Mr. Ahearn to order the cable directly from the Graybar Electric Company (R. 58). This order (Finding of Fact No. XI at R. 22, 23; and R. 190) is the only order signed by appellee Ahearn. In this connection, the testimony of Mr. Ahearn is that prior to submitting his bid, and in Bremerton, Mr. Upson, the salesman of Westinghouse, had assured him that paper-wrapped cable could be furnished in connection with the work in ample time to complete the contract on schedule (R. 149, 150), that

if the entire order for materials were placed with Westinghouse, Westinghouse could obtain the materials, and in the order which was given on February 5, 1952 (R. 149, 150, Pl. Ex. 4), it is clear that a deviation occurred from the directions in the quotation furnished, in that Westinghouse solicited and accepted an order for all of the materials rather than requiring that the telephone cable be directly ordered from Graybar Electric Company (R. 58). The trial court in its findings (Finding of Fact No. XI at R. 22, 23) found that this was the only contract entered into between Ahearn and Westinghouse. Westinghouse knew the contract had to be completed in the fall of 1952 (R. 59) and that at least as early as March, 1952, the penalty for delay was \$40.00 per day (R. 48).

Subsequently, and after the time specified for completion of the contract, there was delivered through Westinghouse at the job site in Bremerton, Washington, latex-covered telephone cable, this delivery occurring in the early part of January, 1953. As of December 31, 1952, the Westinghouse Company at Seattle billed appellee Ahearn for latex-covered telephone cable at an increase in price over and above paper-wrapped telephone cable, which is the amount involved in this action. In other words, Ahearn has paid to the Westinghouse Company the full purchase price of paper-wrapped cable and the suit instituted by Westinghouse is for the difference in the price of the two types of cable (R. 83).

Upon receipt of the latex-covered cable, the Westinghouse Company was immediately contacted (R. 162)

and was advised that latex-covered cable instead of paper-wrapped cable had arrived. The Westinghouse Company was likewise and at the same time advised that latex-covered cable had never been ordered.

Upon arrival of the latex-covered cable at the Bremerton Navy Yard, appellee Ahearn advised the Navy Yard that latex-covered cable had arrived, that it had not been ordered, and asked instructions, as well as a possible increase in contract price or a reordering of materials (Pl. Ex. 20). The contracting officer of the Navy immediately communicated with Mr. Ahearn by letter (Pl. Ex. 20A), in substance advising Mr. Ahearn that the latex-covered cable met the specifications of the contract and ordering him to immediately install the latex-covered cable or, in the alternative, be subjected to a daily penalty as provided in the contract (R. 144, Pl. Ex. 20A) of \$40.00 per day for delay. Under compulsion, the latex-covered cable was installed, at all times under protest to the Westinghouse Company (R. 82), and at no increase in contract price to appellee Ahearn (Finding of Fact No. X, R. 20).

The action of Westinghouse was on the basis of an express contract, in that it was contended by Westinghouse that on the 10th day of March, 1952, the defendant Ahearn had changed his order from paper-wrapped cable to latex-covered cable at an increase in price, being the amount sued for in this action. In support of the theory of an express contract, Westinghouse produced as witnesses its salesman, Merritt Upson, who, at the time of trial testified that a change order had been given to him at the place of business of appel-

lee Ahearn by appellee Ahearn directly (R. 44); that the order was written up by salesman Upson and in substance that it was by virtue of this order that the latex-covered cable was shipped. In the pre-trial deposition of salesman Upson taken on behalf of the appellees, salesman Upson testified that the change order had been placed with him by the witness A. L. Rockwell, then the foreman of appellee Ahearn (R. 61, 62). The Westinghouse Company had, among other witnesses in support of its suit on an express contract, A. L. Rockwell, whose testimony was taken by deposition. Witness Rockwell testified he did not order the latex-covered cable (R. 133, 134). Westinghouse also produced a former employee of appellee Ahearn, Lawrence B. Blackman, now employed by Rockwell in his own business at Moses Lake, Washington, who testified that he was in the office of appellee Ahearn on March 10, 1952, rewinding motors (R. 119), when appellee Ahearn ordered latex-covered cable (R. 103). The time book of witness Blackman (R. 123, 124) discloses that he was engaged in Navy Yard work on the day in question, that the entries in the time book are in his own handwriting, and if he did Navy work by his own testimony he would not be on the rewind bench (R. 125). The testimony of Mr. Ahearn (R. 153) and his wife, Mrs. Goldie Ahearn (R. 199), testifying for the appellees, disclosed that no Navy Yard work was done at the place of business of appellee Ahearn, and that on the 10th day of March, 1952, witness Blackman was in fact working but at the Navy Yard.

We think that it is unnecessary to detail further the conflicts in testimony occurring at the time of trial,

since it is conceded by the appellants that although their original cause of action (R. 3) was based upon an express contract, that cause of action has been abandoned (Brief of Appellant, pp. 5 and 46). Analyzing the Findings of Fact entered by the court (Finding of Fact No. VI, R. 16, at R. 17 and 18), Westinghouse accepted an order from Ahearn for paper-wrapped telephone cable. This was by way of a written order signed by appellant Ahearn personally and dated February 5, 1952. This order (Pl. Ex. No. 4) was accepted by Westinghouse and was the only document in connection with materials for the work to be performed signed by Ahearn (R. 189, 190), and in Finding of Fact No. XI (R. 20 and 21) the court found,

“We start out with a situation that the only contract or order bearing the definite signature of the defendant Ahearn is Plaintiff’s Exhibit 4, which was the original order and contract for this cable and which called for not the latex here in controversy but paper-covered cable, which all agree was the subject of the original contract.”

The court further found in Finding of Fact No. V (R. 16) that the amount sued for by the appellant Westinghouse, plaintiff below, was the difference in price between paper-covered telephone cable and latex-covered telephone cable. The court further found (Finding of Fact No. VII, R. 18) that the time for Ahearn to complete his contract with the Navy was in the month of August, 1952. The court further found (Finding of Fact No. IX, R. 19) that in the month of January, 1953, latex-covered telephone cable was delivered instead of paper-covered telephone cable, that at the time of such

delivery the time for completion of Ahearn's contract with the Navy had passed, that at or about the time of the receipt of the latex-covered cable Ahearn received from Westinghouse an invoice showing an increase in price over paper-wrapped telephone cable of the principal amount involved in this action, and that the increase in price and substitution of cable was protested by Ahearn prior to its use in completing the contract. The court further found (Finding of Fact No. X, R. 20) that Ahearn was instructed by the Navy Department to proceed with the installation of the latex-covered cable and no increase in contract price was given to Ahearn by its use, and that Ahearn did not benefit by such substitution. The court further found (Finding of Fact No. XI, R. 20 at R. 22) :

“The only convincing testimony which cannot be impaired in any way by other testimony now in the record is in defendant's favor and is Plaintiff's Exhibit 4 which is the original order and contract signed by Mr. Ahearn and which calls not for latex but for paper-covered cable. Other than that, all of the vitally material testimony in the case is so hopelessly in conflict and so obviously shows that some witness or witnesses have purposely, knowingly and wilfully falsified as to the material facts in this matter, that this Court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff's burden of proof in support of the cause of action alleged in plaintiff's complaint.

“Plaintiff contends that, in any event, the evidence establishes an implied contract entitling plaintiff Westinghouse to a recovery against defendants. The defendant Ahearn, however, is not

shown by the evidence to have received any greater benefit from the substitution of latex cable than he before the substitution had a contract right to receive from the use of paper-covered cable. Therefore, no implied contract liability is visited upon that defendant. The United States of America through the Navy Department is the only one whose position might be said to be better today by reason merely of the use on the job of latex instead of paper-covered cable, but no relief for or against the United States is sought here. In this action, plaintiff Westinghouse is not entitled to any recovery based on implied contract."

ARGUMENT

Specifications of Error by the Appellant

An analysis of the specifications of error by the appellant shows that but two errors assigned are material to a determination of this appeal. In Assignment No. 1, appellant contends that the court erred in not finding (Finding of Fact No. XI, R. 23) that an implied contract in fact existed between Westinghouse and Ahearn, and in Assignment No. 2 that the court erred (Finding of Fact No. X, R. 20) in finding that Ahearn did not benefit by his receipt and use of the latex-covered cable.

An Implied Contract in Fact Did Not Exist

The Findings of Fact, Conclusions of Law and Judgment of the court were that no express contract existed between Westinghouse and Ahearn in connection with the substitution by Westinghouse of latex-covered cable at an increase in price over paper-wrapped cable, which had been ordered and which order had been accepted by Westinghouse.

No assignment of error was based upon that portion of the trial court's Finding of Fact No. XI (R. 19 and 20) stating, "That the said increase in price and substitution of cable was protested by the defendant Ahearn prior to the use by the defendant Ahearn of the substituted cable," and the testimony of plaintiff's witnesses confirms the objection and protest as being continuous (R. 81, 82, 83 and 84). It is, of course, conceded that the latex-covered telephone cable was used in performance of the contract; however, the use of the cable was under order of the Navy Department, which order was in writing and dated January 26, 1953, and was introduced in evidence as Plaintiff's Exhibit 20A. The communication from the Navy Department pointed out the fact that the date of completion of the contract was then October 28, 1952 (that date being some three months prior to the date of the Navy Department's letter); that the material delivered met the requirements of the contract; that Ahearn should proceed to install the material then on the job site (referring to the latex-covered cable) or in the alternative the Navy would invoke the liquidated damage penalty of the contract, which was in the amount of \$40.00 per day.

It is to be borne in mind that Westinghouse knew of Ahearn's required completion date of the contract (R. 59) and, of course, of his continuous denial of having ordered latex-covered telephone cable and his continuous objections to the increase in price of the substituted cable.

There could be no contract implied in fact as between Westinghouse and Ahearn. The law with reference to

contracts implied in fact is well stated in the case of *Ross v. Raymer*, 34 Wn.(2d) 128, 201 P.(2d) 129, wherein the court said:

“A true implied contract, or contract implied in fact, is an agreement which depends for its existence on some act or conduct of the party sought to be charged, and arises by inference or implication from circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention on the part of the parties to contract with each other. *Troyer v. Fox*, 162 Wash. 537, 298 Pac. 733, 77 A.L.R. 1132; *McKevitt v. Golden Age Breweries, Inc.*, 14 Wn.(2d) 50, 126, P.(2d) 1077; *Kellogg v. Gleeson*, 27 Wn.(2d) 501, 178 P.(2d) 969; *Ammerman v. Old Nat. Bank*, 28 Wn.(2d) 239, 182 P.(2d) 75; 12 Am. Jur. 498, *et seq.*, Contracts, Secs. 4, 5; 17 C.J.S. 318, 319, Contracts, Sec. 4(b).

“In each of the first three cases cited in the preceding paragraph, we quoted with approval the following language taken from *Western Oil Refining Co. v. Underwood*, 83 Ind. App. 488, 149 N.E. 85:

“ ‘A true implied contract is an agreement of the parties arrived at from their acts and conduct viewed in the light of surrounding circumstances, and not from their words, either spoken or written. *Like an express contract, it grows out of the intentions of the parties to the transaction, and there must be a meeting of minds.* Such a contract differs from an express contract only in the mode of proof.’ (Italics ours.) ”

A meeting of the minds between Westinghouse and Ahearn at no time occurred and at all times Ahearn protested the substitution of material and the increase

in contract price. This, of course, is admitted, as is the fact that Ahearn at no time recognized any liability to Westinghouse for more than the materials and cable he had actually ordered.

The law is well settled that a contract cannot be implied against the express declaration of the person to be charged. *Consolidated Products Co. v. Blue Valley Creamery Co.* (8th Circuit) 97 F.(2d) 23; *Linddeke v. Chevrolet Motor Co.* (8th Circuit) 70 F.(2d) 345; *Municipal Water Works Co. v. City of Ft. Smith* (D.C. Ark.) 216 Fed. 431; *American Mutual Liability Ins. Co. v. McDiarmid*, 211 Ala. 127, 99 So. 849.

It seems to us that the action on the part of Westinghouse in substituting latex-covered telephone cable for paper-covered telephone cable is similar in principle to the case of *Helber v. Schaible, et al.*, 183 Mich. 1379, 150 N.W. 145. In that case the plaintiff purchased an automobile from the defendant. The automobile was warranted; however, from time to time it became necessary for the automobile to be returned to the dealer-seller for repair. When the automobile was in the possession of seller for a period, a fire occurred in which the automobile was damaged. The dealer recommended that the car be returned to the factory for complete repairs, including, of course, the fire damage. The purchaser of the automobile, the plaintiff, told the dealer he would not pay for such repairs. Nevertheless, the dealer sent the car to the factory. After repairs, the purchaser of the car was billed for them. The purchaser plaintiff brought an action for replevin and recovered the automobile from the dealer. The court

held that there was no implied promise on the part of the plaintiff to pay for the repairs to the automobile, which he had never ordered and to payment for which he had expressly objected before they were made. In this case, if Westinghouse chose to substitute cable which was not ordered, we see no difference from a situation where a dealer in automobiles has unauthorized repairs made.

Cases Cited by Appellant

The cases cited by the appellant, commencing at page 21 of appellant's brief, to support the proposition that Ahearn must pay the billing price of the latex-covered telephone cable as billed instead of the price of paper-wrapped cable which was ordered, may be distinguished. In *Mutual Sales Agency v. Hori*, 145 Wash. 236, 259 Pac. 712, a number of telegrams were sent between the parties in connection with the ordering of potatoes. The appellant in that case shipped potatoes to the respondent and attached to its bill of lading a sight draft for the purchase price. Respondent, after having wired appellant and received an explanatory telegram as to a difference in quality and price of the potatoes shipped, paid the draft, took the potatoes and brought the action at a later date to recover the difference in what he contended to be the proper purchase price. The court held that the respondent acted voluntarily in paying the draft and that the general rule is that one person cannot make himself the creditor of another by voluntarily paying a demand of the other which he is under no obligation to pay, and the court

further found that the payment made was with full knowledge of all the circumstances.

In *Cuschner v. Pittsburgh-Hickson Co.*, 91 Wash. 371, 157 Pac. 879, action was again brought to recover a portion of the purchase price for goods contended not to have been ordered. In the *Cuschner* case, in addition to having paid the purchase price of goods shipped, the purchaser placed the merchandise in his store and some of it was sold. The court in that case held that the goods had been accepted.

In *Koths v. Shagren*, 38 Wn.(2d) 52, 227 P.(2d) 446, groceries were shipped to the defendant grocer and the goods were received at his usual place of business, with invoices. No complaint was made as to the invoice price and the court announced its adherence to the rule that *where a statement of account has been rendered and no objection made* (italics ours), the buyer by his silence does not preclude or estop himself from challenging the correctness of the account, but his silence does establish *prima facie* the accuracy of the items without further proof.

In the case of *Western Asphalt Co. v. Henrik Valle*, 25 Wn.(2d) 428, 171 P.(2d) 159, a situation existed whereby Western Asphalt Co. brought suit against defendant Valle for services performed in connection with a bid by the defendant Valle. No discussion was had relative to payment for the services rendered. The court stated that under the general rule an implied contract must be shown to have been performed under reasonable expectation of payment on the part of the person performing the services, and that the person

sought to be charged must have known that the services were to be charged for. The court held that in connection with instructions, the belief of the defendant Valle was immaterial if he as a reasonable man should have understood that compensation was expected. As stated by the Washington Supreme Court in *Chandler v. Washington Toll Bridge Authority*, 17 Wn.(2d) 591, 137 P.(2d) 97, this action was one brought upon a contract implied in fact.

In none of the cases cited by the appellant do we find any case where a contract has been implied in fact contrary to the direct expression of the parties, nor do we find in any case cited by the appellant a situation on a factual basis such as this case, where a supplier of materials accepted an order to furnish materials for the performance of a specific contract for a third party (the Navy) knew when the contract was to be completed, substituted materials at a higher price after the completion date, received the protest of the contractor Ahearn and refusal to pay the price billed prior to any use of the merchandise, and where the contractor Ahearn protested the substitution of materials and was forced to nevertheless utilize them at no increase in contract price.

There Was No Implied Contract in Law

It seems to us that the finding of the trial court (Finding of Fact No. XI, R. 20 at R. 23) is governing. The court said:

“The defendant Ahearn, however, is not shown by the evidence to have received any greater benefit from the substitution of latex cable than he before

the substitution had a contract right to receive from the use of paper-covered cable. Therefore, no implied contract liability is visited upon that defendant. No liability attaches to the surety defendant except as to the liabilities of the defendant Ahearn. The United States of America through the Navy Department is the only one whose position might be said to be better today by reason merely of the use on the job of latex instead of paper-covered cable, but no relief for or against the United States is sought here."

Under the facts as adduced there is no doubt that Ahearn was required by the Navy letter of January 26, 1953, (Pl. Ex. No. 20a) to proceed to install the latex-covered telephone cable or be subject to a daily penalty of \$40.00 for each calendar day's delay. Similarly, there is no question but what time had expired for the completion of his contract with the Navy.

The brief of the appellant, at page 30, correctly quotes from Sec. 1.b., *Restatement of the Law of Restitution*, in which in substance it is stated that a person confers a benefit upon another if he gives the other possession of or some interest in money, land, chattels, etc., or performs services beneficial to or at the request of the other, etc. * * * or satisfies a debt or duty of the other; and the section further states,

"He confers a benefit not only where he adds to the property of another, but also where he saves the other some expense or loss."

However, appellant fails to preface the quotation wherein it is stated in Sec. 1.,

"A person who is *unjustly* enriched at the ex-

pense of another is required to make restitution to the other.” (Italics ours)

and, in Sec. 1.c.,

“Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the persons, it is unjust for him to retain it. The mere fact that a person benefits another is not in itself sufficient to require the other to make restitution therefor.”

If it be accepted that Ahearn, for the purpose of argument, received a benefit in that he was not required to sustain a \$40.00 per day penalty for delay, when the contract with the Navy was at that time three months beyond its completion date, by using the latex-covered cable, was he enriched and was his enrichment unjust? The court's Findings of Fact (Finding No. X, R. 20) show that Ahearn received no increase in contract price and of course, as a result, Ahearn did not profit. What Ahearn received was merely the contract price he would have received had Westinghouse supplied the paper-covered telephone cable. Ahearn has paid to Westinghouse the price of paper-covered telephone cable. In other words, Ahearn is in the same position as he would have been had Westinghouse fulfilled its accepted order for paper-covered telephone cable. Since Ahearn is in that position, he is not enriched nor is he unjustly enriched.

In *Chandler v. Washington Toll Bridge Authority*, 17 Wn.(2d) 591, 137 P.(2d) 97, the two elements of a contract implied by law are stated: (1) that the party

sought to be held has been enriched, and (2) that the enrichment must be unjust.

The Miller Act

In the appellant's concluding argument on page 44 of its brief, it seems to be argued, first, that the appellant urges its right to recover merely because of the invoice price, or, second, under quasi contract (contract implied in law), or, third, separately under the Miller Act, Title 40, U.S.C., Sec. 270a. *et seq.*

The right of action of Westinghouse against appellee Ahearn arises out of an alleged contract between itself and appellee Ahearn. The right of action against appellee The Aetna Casualty and Surety Company, a corporation, arises out of the provisions of what is known as the Miller Act, Title 40, U.S.C., Secs. 270a. and 270b. Title 40, U.S.C., Sec. 270a.(a) provides:

“Before any contract, exceeding \$2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds,
* * * (2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person.” (Referring to the contractor awarded the contract)

The payment bond (Pl. Ex. No. 1) in part provides as follows:

“THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the principal entered into

a certain contract with the Government, numbered and dated as shown above and hereto attached;

“NOW, THEREFORE, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.”

Title 40, U.S.C., Sec. 270b.(a) in part provides as follows:

“Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor * * * shall have the right to sue on such payment bond for the amount or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him:”

Subsection (b) provides for the institution of action in the United States District Court for any district in which the contract was to be performed and executed.

The action herein instituted by Westinghouse was for money due (R. 3, 4, 5, 6) against both the contractor, appellee Ahearn, and the contractor's surety, appellee The Aetna Casualty and Surety Company, a corporation.

Nowhere in the Miller Act is there any provision for the payment of attorney's fees to the successful party,

nor in the payment bond furnished in this action is there any provision for the payment of attorney's fees. It is contended on the part of the appellant that where a local statute provides for attorney's fees in a materialman's lien foreclosure, attorney's fees are allowed in a Miller Act suit, and in support of this proposition appellant cites *United States v. Breeden*, 110 Fed. Supp. 713 (D. C. Alaska, 3rd Div., 1953). A careful examination of the *Breeden* case, *supra*, shows that Sections 55-11-51 and 55-11-52 of the Alaska Code allow the court to fix attorney's fees in the following manner: Section 55-11-51, Compensation of Attorneys, provides:

"The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto, which allowances are termed costs."

Section 55-11-52 provides for costs which are allowed in various types of actions, but is briefly stated as follows: Subsection 1., dealing with the recovery of or possession of real property; Subsection 2., dealing with fines and forfeitures; Subsection 3., involving an open mutual account; Subsection 4., relating to recovery of personal property; Subsection 5., in actions not thereinbefore specified for the recovery of money or damages, where the plaintiff shall recover \$50.00 or more.

The court, in allowing attorney's fees in the *Breeden* case, *supra*, quoted the statute in its decision and pointed out that the Alaska Code did provide for attor-

ney's fees and that not only were the sections referred to a part of the procedural statutes of Alaska, but were a part of an Act of Congress approved June 6, 1900, entitled "An Act Making Further Provision for a Civil Government for Alaska and for Other Purposes," 31 Stat. 321.

In the court's decision nothing is said about materialmen's lien foreclosures, and from a reading of the case and the Alaskan statutes cited, it is apparent that the court in Alaska has the power to allow attorney's fees in any kind of an action as a matter of discretion. It is apparent also from a reading of the case that the allowance by the court was under Subsection 5. of Section 55-11-52, where attorney's fees are allowable for the recovery of money where the plaintiff recovers more than \$50.00.

The only other case that we have been able to find dealing directly with the subject is the case of *United States to the use and benefit of Watsabaugh & Company, et al, v. Seaboard Surety Co., et al.* (D. C. Montana) 26 F. Supp. 681, which was an action under the Heard Act (the act preceding the Miller Act), in which there were numerous parties seeking to recover against the Seaboard Surety Co. In connection with the claim of the Interstate Heating & Plumbing Company to recover for labor and materials, attorney's fees were sought.

The court denied any recovery of attorney's fees under the Montana statute. The decision is not as clear as it might be because there were apparently two grounds for the denial of attorney's fees, one being that

the claim of the Interstate Heating & Plumbing Company was announced in open court to have been settled and that the settlement as such did not constitute a recovery, and, second, that the statutes of Montana in any event did not provide for the recovery of attorney's fees in this type of action. The court in the Montana case quoted with approval from *Albrecht v. Albrecht*, 83 Mont. 48, 209 Pac. 158, 161, as follows:

“Costs co nomine were not recoverable by either party at common law. They are the creatures of the statute, and in this state the right to recover costs must depend upon our code provisions.”

The court also quoted with approval from *McBride v. School District No. 2*, 88 Mont. 110, 290 Pac. 252, 255 (an action for the recovery of salary against the defendant School District, in which attorney's fees were sought, and denied):

“The items which may be recovered as costs in an ordinary action are enumerated in Section 9802, Revised Codes, 1921. This action is exclusive, except insofar as certain cases are taken out of its operation by special statutes, and in the absence of statute, stipulation or rule of court (assuming such rule may be promulgated) attorney's fees are not so recoverable.”

The Washington statute cited by the appellant, Sec. 12, Chap. 24, Laws of 1893; R.C.W. 60.04.130, concerns the allowance of attorney's fees in actions to foreclose liens of laborers and materialmen. This action is not such an action, but is an action for money due. As we have pointed out, the Alaska case cited by appellant, *United States v. Breeden*, 110 F.Supp. 713, allowed attorney's fees under the Alaska Code by reason of the dis-

cretionary power of the court in Alaska to allow attorney's fees in connection with the recovery of money.

Applying properly the *Breeden* case, *supra*, and the case of *United States to the use and benefit of Watsabaugh & Company, et al, supra*, the applicable Washington statutes are as follows:

“The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are to be termed costs.” L. 1854, p. 201, Sec. 367; Code 1881, Sec. 505; R.R.S., Sec. 474; R.C.W., Sec. 4.84.010.

“When allowed to either party in the superior court, costs to be called the attorney fee, shall be as follows: (1) in all actions settled before issue is joined, five dollars; (2) in all actions where judgment is rendered without a jury, ten dollars; (3) in all actions where judgment is rendered after impanelling a jury, fifteen dollars.” L. 1854, p. 202, Sec. 374; Code 1881, Sec. 512; R.R.S., Sec. 481, R.C.W., Sec. 4.84.080.

With reference to the liability of the appellee The Aetna Casualty and Surety Company, a corporation, the liability can in no way extend beyond the condition of its bond approved by the contracting officer or of the Miller Act, and as was correctly stated by the trial court (Finding of Fact No. XI, R. 23), “No liability attaches to the surety defendant except as to liabilities of defendant Ahearn.”

CONCLUSION

In conclusion, we respectfully submit that the judgment of the trial court should be affirmed, in that the appellant has abandoned its theory of liability on an express contract.

That the appellant has not established a contract implied in fact for two reasons: First, that to establish a contract implied in fact, as was stated in *Ross v. Raymer*, 32 Wn.(2d) 128, 201 P.(2d) 129, in quoting with approval from *Western Oil Refining Company v. Underwood*, 83 Ind. App. 488, 149 N.E. 85.

“Like an express contract, it grows out of the intention of the parties to the transaction, and there must be a meeting of the minds.”

and by reason of the additional rule that a contract will not be implied in fact against the express declaration of the party to be charged; and, second, from the finding of the trial court in which the court stated in part in Finding of Fact No. XI (R. 20 at R. 22):

“The only convincing testimony which cannot be impaired in any way by other testimony now in the record is in defendants’ favor and is Plaintiff’s Exhibit 4 which is the original order and contract signed by Mr. Ahearn and which calls not for latex but for paper-covered cable. Other than that, all of the vitally material testimony in the case is so hopelessly in conflict and so obviously shows that some witness or witnesses have purposely, knowingly and wilfully falsified as to the material facts in this matter, that this Court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff’s burden of proof in support of the cause of action alleged in plaintiff’s complaint.”

That a contract cannot be implied in law under the law of restitution by reason of the fact that two elements are necessary: (1) A benefit to the person sought to be charged, and (2) that the person sought to be charged has been unjustly enriched, as was stated by the trial court in Finding of Fact No. XI (R. 20 at R. 23):

“ * * * The defendant Ahearn, however, is not shown by the evidence to have received any greater benefit from the substitution of latex cable than he before the substitution had a contract right to receive from the use of paper-covered cable. Therefore, no implied contract liability is visited upon that defendant. No liability attaches to the surety defendant except as to liabilities of defendant Ahearn. The United States of America through the Navy Department is the only one whose position might be said to be better today by reason merely of the use on the job of latex instead of paper-covered cable, but no relief for or against the United States is sought here. In this action, plaintiff Westinghouse is not entitled to any recovery based on implied contract.”

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HONORABLE JOHN C. BOWEN, *Judge*


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REPLY BRIEF OF APPELLANT

SUMMARY OF ARGUMENT

Appellees' brief appears to appellant to answer only two of the arguments urged by appellant in its brief. In essence, appellant argued that it was entitled to prevail for the following reasons:

(1) The District Court should have found a contract implied-in-fact;

(2) The District Court should have found that Ahearn benefited from his use of the latex cable and that there was a contract implied-in-law;

(3) The District Court should have found that plaintiff established all the facts requisite to recovery under the Miller Act.

Appellees' brief with respect to the latter argument is confined to the question of attorney's fees, and does not meet the arguments made in appellant's principal brief, pages 35-40.

Appellant will discuss briefly appellees' answers to each of the first two arguments.

THE DISTRICT COURT SHOULD HAVE FOUND A CONTRACT IMPLIED-IN-FACT

Appellees advance in their brief, pages 9-13, the argument that no contract implied-in-fact can be found in the instant case because Ahearn, while receiving, retaining and using latex cable, at all times denied his liability to pay for that cable, and that the law gives effect to his verbal denials to the exclusion of his conduct. The appellees argue, in effect, that where one obtains possession of goods in the absence of a contract therefor, he may use the goods without becoming liable for the price, so long as he denies any intention to pay for them. This argument is phrased on p. 12 of appellees' brief as follows:

“... a contract cannot be implied against the express declaration of the person to be charged.”

In each of the cases cited by appellees for this proposition, the plaintiff delivered goods or property, or rendered services to the defendant, after being notified that the defendant denied any obligation or willingness to receive the goods or services on the plaintiff's terms. Notwithstanding the plaintiff's knowledge of the defendant's position, the plaintiff thereafter delivered the goods or rendered the services.

The irrelevancy of those cases to the present problem is plain. Here the plaintiff seller did not learn of defendant Ahearn's contention that he was not liable for the price of the latex cable until after the goods had been shipped to Ahearn, and it was Ahearn who retained and used the goods with full knowledge of the position of Westinghouse.

THE DISTRICT COURT SHOULD HAVE FOUND A CONTRACT IMPLIED-IN-LAW

It is submitted that the argument advanced by appellees in their brief, at pages 15-18, assumes the existence of a contractual obligation on the part of Westinghouse to deliver paper-wrapped cable to Ahearn in the third quarter of 1952. This is a convenient assumption for appellees but unfortunately for them is not supported by the facts of the case and the law applicable thereto.

*A. No Contract for Paper-Wrapped
Cable Was Pleaded or Proven.*

The complaint pleaded an express contract between Westinghouse and Ahearn relating to latex cable. The answer merely denied the allegations of the complaint. The District Court found plaintiff Westinghouse had not sustained its burden of proving an express contract. (Findings of Fact XI, Tr. 22, 24.) That finding is not attacked on appeal.

It would seem that the claim of a right to receive and retain the latex cable without becoming liable for the price, by virtue of some agreement, would constitute a counterclaim, or an affirmative defense under Rule 8(c), Federal Rules of Civil Procedure. Assuming, however, that failure to plead the claimed contract could be cured and the answer amended to conform to the proof, no such amendment was requested and none was granted by the trial court.

The reason is clear - - - no such contract was proven. The evidence material to consideration of this question is reviewed briefly below:

(1) Pl. Ex. 3. This exhibit, dated January 31, 1952, is the Westinghouse quotation on materials required for the Navy yard contract and was submitted at the request of Ahearn's foreman. It quoted a price for paper-wrapped cable only since that was the item requested (Rockwell, Tr. 131-2). It clearly

states a delivery date of the third quarter of 1953 for paper-wrapped cable.

(2) Pl. Ex. 4. This exhibit, written February 5, 1952, is a purchase order written on Ahearn's form by Westinghouse's salesman, Upson. It specifies paper-wrapped cable and lists no delivery date, either for that or any other material. It is signed by Ahearn but not by Westinghouse or anyone on its behalf.

(3) Pl. Ex. 5. This exhibit, dated February 5, 1952, is a "re-write" or "take-off" of Pl. Ex. 4 on the Westinghouse order form. It provides a space for the signature of the customer but not the seller and specifies: "This Order subject to the Company's acceptance at its office."

(4) Pl. Ex. 6. This is a letter dated February 19, 1952, in which Westinghouse gives Ahearn the delivery dates on certain materials ordered on Pl. Ex. 4 and 5. It again advises Ahearn that the delivery date of paper-wrapped cable is the third quarter of 1953 and goes on to state that latex cable is available for third quarter of 1952 delivery.

(5) Pl. Ex. 8. This is a letter dated February 19, 1952 by which Ahearn forwarded Pl. Ex. 6 to advise the Navy of delivery dates on material for his Navy contract.

(6) Pl. Ex. 9. This is the Navy reply, dated March 7, 1952, to Pl. Ex. 8. It approves the use of latex cable.

(7) Testimony of Ahearn, Tr. 150, 180-181. Ahearn testified that on January 31, 1952 Upson stated that he could deliver paper-wrapped cable in August 1952 contrary to the provisions of the quotation. Ahearn further testified that when he later received Pl. Ex. 6 repeating the third quarter 1953 delivery date for paper-wrapped cable: "I didn't pay no attention to that. I sent it over to Pier 99 because I figured Westinghouse would fulfill their contract because he (Upson) stated there that he would get it on time there, and I didn't think anything more about the wire."

(8) Pl. Ex. 21 and 22 and Testimony of Upson, Tr. 202-5. These exhibits are the expense account of Upson covering the period including January 13, 1952 and establish that Upson could not have discussed Pl. Ex. 3 with Ahearn at the time testified to by Ahearn.

Summarizing the evidence, it may be seen that the order, Pl. Ex. 4, on which appellees place so much reliance, is silent as to delivery date for paper-wrapped cable. The only written evidence as to delivery date is contained in Pl. Ex. 3 and 6, and Ahearn's knowledge thereof conclusively appears from Pl. Ex. 8 and 9. These documents show delivery of paper-wrapped cable in the third quarter of 1953. In contradiction thereto Ahearn's testimony that on the same day he received Pl. Ex. 3 from Upson, Upson promised 1952 delivery on paper-wrapped cable

and that he, Ahearn, accepted that assurance and paid no further attention to the matter, is inherently unbelievable in the light of Pl. Ex. 6, 8 and 9. Upson's testimony that he made no such statements as to delivery date and in fact did not see Ahearn on the day when he is claimed to have made the statements, and the documentary evidence on that point, Pl. Ex. 21 and 22, seem conclusive on the matter to appellant.

Appellees face another difficulty. Pl. Ex. 4 and the "take-off," Pl. Ex. 5, are not signed by Westinghouse or anyone on its behalf. Appellees must point to an acceptance of the order for paper-wrapped cable by Westinghouse. The only writings related to paper-wrapped cable signed by Westinghouse are Pl. Ex. 3 and 6, both specifying delivery in the third quarter of 1953. To hold Ahearn's order, Pl. Ex. 4, a contract for 1952 delivery of paper-wrapped cable binding upon Westinghouse would do violence not merely to the evidence but to the statute of frauds section of the Sales Act, R.C.W. 63.04.050, L. Wash. 1925 ex. s. c. 142, Sec. 4, which provides in pertinent part, as follows:

"A contract to sell or a sale of any goods . . . of the value of \$500.00 or upwards shall not be enforceable by action . . . unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

There is no writing signed by the party here

sought to be charged, Westinghouse, which specifies delivery of paper-wrapped cable at any time prior to the third quarter of 1953.

The burden of proof as to the existence of the contract for third quarter of 1952 delivery of paper-wrapped cable would, of course, be on the appellees as the parties asserting such a contract. In appellant's view the evidence relating thereto is conclusive that no such contract existed but it is unnecessary to appellant's position that this court agree. In order to affirm the District Court on the theory that Ahearn had a contract right to receive paper-wrapped cable prior to the third quarter of 1953, this Court must hold that appellees have established such a contract by a preponderance of the evidence.

***B. The District Court Did Not Find
A Contract for 1952 Delivery of
Paper-Wrapped Cable.***

Appellant thinks it clear that the District Court did not find a contract for third quarter of 1952 delivery of paper-wrapped cable and refers to its original brief herein, at page 42, in that respect. It is true that in portions of his oral memorandum opinion, set forth verbatim in Finding of Fact XI (Tr. 20), the District Judge referred in some instances to Pl. Ex. 4 as a "contract or order" or "order and contract" (Tr. 20, 22). That language of the District Judge cannot be construed in the

manner contended for by appellees. The findings read in their entirety make it clear that the Judge rejected the oral testimony of both sides. The Judge said, "On all issues the Court decides in favor of the defendants because of lack of convincing proof and because the plaintiff has not sustained its burden of proof to establish the material allegations of the complaint by a preponderance of the evidence." (Tr. 24.) If the District Judge had considered that appellees had established a contract for the 1952 delivery of paper-wrapped cable, he could have said so simply and unequivocally, but he did not.

However, if this Court determines that the District Judge's findings must be interpreted as finding a contract for 1952 delivery of paper-wrapped cable, then appellant submits that this finding is clearly erroneous in the light of all the evidence set forth above.

CONCLUSION

Appellant again urges this Court to consider this case in its simple but essential outline as one in which goods have been retained and used by a party who disclaims liability for the price or value thereof, and appellant asks only that the claim of the right to do so be reviewed by the Courts.

Respectfully submitted,

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IN THE
UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the
use of Westinghouse Electric Supply
Company, a corporation and all
similarly situated,

Appellant,

vs.

JOHN V. AHEARN, SR., an individual
doing business under the firm name
and style of Ahearn Electric Com-
pany and THE AETNA CASUALTY AND
SURETY COMPANY, a corporation,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S PETITION FOR REHEARING

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No. 14537

IN THE
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 FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, for the
 use of Westinghouse Electric Supply
 Company, a corporation and all
 similarly situated,

Appellant,

VS

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 doing business under the firm name
 and style of Ahearn Electric Com-
 pany and THE AETNA CASUALTY AND
 SURETY COMPANY, a corporation,

Appellees.

CERTIFICATE

STATE OF WASHINGTON }
 COUNTY OF KING } ss

MARTIN P. DETELS, JR., being first duly sworn
 upon oath, deposes and says that he is one of the
 attorneys for the appellant; that the within petition
 for rehearing is, in his judgment, well founded and
 is not interposed for delay.

S/ Martin P. Detels,

SUBSCRIBED AND SWORN to before me this 22
 day of November, 1955.

S/ Gordon W. Mass

Notary Public in and for the State
 of Washington, residing at Seattle.

PETITION FOR REHEARING

The appellant herein, plaintiff in the court below, herewith petitions this Honorable Court for a rehearing upon this appeal and assigns the following reasons in support of this petition:

1. The court failed and refused to apply the substantive law of contracts of the State of Washington applicable to the case.

2. In its opinion the court misinterpreted the trial court's findings of fact and the evidence in the case.

ARGUMENT ON REASON NO. 1

This court's opinion appears to rest upon the basis that there was a binding contract between the appellant, Westinghouse Electric Supply Company, and the individual appellee, John V. Ahearn, Sr., for the delivery of paper-wrapped telephone cable in August 1952, and that the delivery of latex telephone cable by the plaintiff was tendered in performance of that contract. Appellant disputes that there is any support in the findings of the trial court or in the record for this position. Under this heading, however, appellant urges that the decision of the court was erroneous and must be reversed as contrary to the law of the State of Washington which controls, even under the facts recited in the court's opinion.

In a Miller Act suit, federal courts are bound to

apply the substantive law of contracts of the State of Washington in which the relevant transactions occurred. *Continental Casualty Co. v. Schaeffer*, 173 F. (2d) 5 (Ninth Cir., 1949) (Appellant's Brief, page 20)

This court's opinion appears to hold that where two parties contract for the sale and delivery of specific goods at an agreed price and the seller delivers different goods at a higher price the buyer can take and retain the goods delivered, with knowledge of the higher price demanded by the seller, and pay only the lower price. The law of Washington is to the contrary and requires that appellant's petition for rehearing be granted and the decision of this court reversed.

In *Mutual Sales Agency v. Hori*, 145 Wash. 236, 259 Pac. 712 (1927) (Appellant's Brief, pages 21-23, 30-31, 43), the Supreme Court of Washington had before it a controversy indistinguishable in any material respect from the instant case as viewed by this court.

The material facts in that case were as follows:

1. On March 31, the buyer, Mutual Sales Agency, Inc., wired the seller, M. M. Hori, requesting a quotation on "certified and uncertified gems (potatoes) two to ten ounce."

2. On the same day the seller replied: "Uncertified gems two to eight ounce, our best price three seventy for car."

3. On April 1, seller sent buyer a second quotation as follows: "Netty gem immature seed, price two eighty f.o.b. car, size one to eight ounce field run . . ."

4. On the same day, April 1, buyer wired seller as follows: "Ship immediately . . . the car seed offered your wire date."

5. On April 1, seller wired: "Wire received. Ship you Saturday twenty ton car per instructions."

6. Seller shipped potatoes of the grade specified in its March 31 wire (2 above) and forwarded the bill of lading with a sight draft for the purchase price attached to a bank in the buyer's city.

7. When the shipment arrived buyer wired seller that the potatoes were satisfactory but the price was in error and referred to the seller's wire of April 1 (3 above).

8. Seller replied referring to its wire of March 31 (2 above) and buyer's wire of April 1 (4 above) claiming the latter was acceptance of the former, and insisting car contained more expensive grade of potatoes.

9. Buyer did not answer the last wire but paid the draft, took delivery of the potatoes and disposed of them.

10. Buyer then commenced action to recover the difference between the prices of the two grades of potatoes and garnished the money it had paid to the bank in order to procure the delivery of the potatoes.

In that case the lower court rendered a judgment in favor of the buyer. The Supreme Court of Washington reversed the judgment with directions to enter judgment in the seller's favor.

The Washington Supreme Court assumed that

there was a binding contract for the sale of the lower grade potatoes at the lesser price and that buyer might have maintained an action for breach of the contract to deliver the lower grade of potatoes. It rejected the buyer's argument that having resold the potatoes prior to their delivery it was compelled to accept them to make good its commitment to its vendee.

This case is indistinguishable. Here the seller delivered the more expensive goods and the buyer accepted and used the goods with knowledge of the higher price demanded. The buyer resists recovery of the balance on the purchase price and this court permits it to do so on the ground that Westinghouse breached a contract for delivery of the less expensive paper-wrapped cable. The *Mutual Sales* case, which is controlling in this court, holds that the buyer cannot receive and retain higher priced goods with full knowledge of their price and pay only the agreed price for a lower grade of goods, but that in such case the buyer's remedy is an action for damages for breach of the claimed contract.

The *Mutual Sales* case, referred to three times in appellant's brief and relied upon in oral argument before this court represents the law of Washington, has not been overruled, was not referred to by this court in its opinion, and requires reconsideration of the court's decision.

ARGUMENT ON REASON NO. 2

Appellant respectfully submits that the court's opinion contains assertions of fact not supported by the trial judge's findings or the evidence in the case in the following respects:

1. "Ahearn applied to Westinghouse for prices of suitable material under the specification to be used in his own bid." (Opinion, page 2) "... (Westinghouse) accepted responsibility for choosing the materials and prices upon which Ahearn based his bid, ... " (Opinion, page 3).

The only finding of fact bearing on the preparation of the quotation is finding No. VI, which is silent as to whether Westinghouse or Ahearn selected the materials on which the quotation, Exhibit No. 3, was based. The only testimony on the point is that of Mr. Rockwell, Ahearn's foreman at the time, who was the person who requested the quotation. He did not request a quotation on latex-covered cable. The matter was discussed between Rockwell and Ahearn. (Rockwell, Tr. 131-133). There is no contrary testimony.

2. "... in accordance with the previous dealings Westinghouse accepted the order ... (for paper-covered cable) ... but eliminating the time limitation ..." (Opinion, page 3). "The trial court found on conflicting evidence that there was an express

contract between the parties that Westinghouse should furnish paper-covered cable before the end of the month of August, 1952, at about \$1800.00." (Opinion, page 2).

The trial court found that Exhibit 4, Ahearn's order for paper-wrapped cable, was accepted by Westinghouse (Finding of Fact No. VI, Tr. 18). It did not find that the delivery date had been changed from the third quarter of 1953, as specified in the quotation, Exhibit No. 3, to August 1952. The order referred to, Exhibit No. 4, was not signed by Westinghouse. Exhibit No. 5, a rewrite of Exhibit No. 4 on Westinghouse's form, a copy of which was mailed to Ahearn, (Upson, Tr, 37) specified that the order was "subject to acceptance at the Company's home office."

The only evidence in this record to which the trial court's finding of acceptance by Westinghouse could refer would be the Westinghouse letter to Ahearn, dated February 19, 1952, Exhibit No. 6, which read in pertinent part as follows:

"Gentlemen:

The following items show approximate delivery on material ordered for major repairs to Electric Distribution System, Quarters Area, Puget Sound Naval Shipyard on C-2 priority:

Western Electric Telephone Wire 6 pr., & 51 pr. paper and sheath—3Q53.

U.S. Rubber Latex Telephone Wire 6 pr., 26 pr. and

51 pr.—3052. U. S. Rubber take exception to sub paragraph "B" under Paragraph 5-09 in that the Mutual capacitance of their wire is .115 MFD instead of .090 as specified."

It should be recalled that Ahearn forwarded this letter to the Navy by a letter, also dated February 19, 1952, (Exhibit 8), and that the Navy replied to Ahearn under date of March 7, 1952, Exhibit 9, authorizing installation of latex cable of the specified characteristics. (It should here be noted that the court's statement at page 3 of the opinion that Ahearn's contract with the Government contained "an express designation of paper-covered cable" is in error. The contract is in evidence as Exhibit No. 18, and it merely incorporates the provisions of the specification, Exhibit No. A-3, paragraph 5.09 of which authorized the installation of either paper-wrapped or latex cable. The exchange of correspondence between Ahearn and the Government, in Exhibits 8 and 9, merely amended the required "mutual capacitance" set forth in the specification and contract.)

The findings as a whole make it clear that the trial court did not accept Ahearn's testimony that he was assured by Westinghouse's salesman, Upson, that the paper-wrapped cable could be delivered in August 1952. The court said (Finding of Fact No. XI, Tr. 20):

"... Someone among the witnesses is obviously

and knowingly not telling the truth, and I do not know who it is . . .

" . . .

"Both (Mr. Upson and Mr. Ahearn) are interested witnesses. One or the other of them is bound to be telling a falsehood and knows it. I cannot tell which one it is.

" . . .

" . . . This court can come to but one conclusion, and that is that the plaintiff in this case has failed to sustain the plaintiff's burden of proof in support of the cause of action alleged in plaintiff's complaint."

It is submitted that the trial court's findings make it clear that it did not find affirmatively for the defendant that there was a contract for August 1952 delivery of paper-wrapped cable. No such issue was tendered by the pleadings, and no such issue was before it.

The trial court did find, and it is not disputed on this appeal, that plaintiff failed to sustain its burden of proof that there was an express contract for the delivery of latex cable.

3. "When the latex-covered cable was shipped, there was performance of the terms of the express contract." (Opinion, page 3). "If the cable had been diamond-studded when tendered in performance of the accepted order, Ahearn could have kept it . . . " (Opinion, page 4).

In these statements and others, the court's opinion implies that Westinghouse tendered the latex

cable in performance of a contract for paper-wrapped cable. Aside from the incredibility inherent in the proposition that material of a reasonable value of \$7,646.29 would be delivered in performance of a contract calling for the payment of the sum of \$5,469.51 less, the record is replete with testimony that the latex cable was tendered by Westinghouse in performance of what it understood to be an express contract for latex cable, and entirely devoid of any evidence that it was tendered in performance of a contract for paper-wrapped cable.

Westinghouse invoiced Ahearn for the latex cable on December 30, 1952, Exhibit 16. It was received by Ahearn "about the next day." (Ahearn, Tr. 161). Ahearn himself did not claim that the latex cable was tendered by Westinghouse in performance of a contract for paper cable. His testimony was that Westinghouse's representatives contended he had ordered it. (Ahearn, Tr. 165) The wire was not installed until sometime after January 26, 1953 (Rockwell, Tr. 143-145). There is no contrary testimony.

CONCLUSION

It is respectfully submitted that appellant's petition for rehearing should be granted, for the reasons above stated, in that the court failed and refused to apply the substantive law of contracts of the State of Washington, as relied upon by the ap-

pellant, and for the further reason that the court's opinion reveals that it misinterpreted the record in the foregoing substantial and material respects.

Respectfully submitted,

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Attorneys for Appellant.

Number 14538

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARTIN J. SAMPSON, CHIEF of the
SWINOMISH TRIBE OF INDIANS,
Appellant,
vs.

JOSEPH JOE, et al, as members of the Senate
of the Swinomish Indian Tribal Community,
A Federal Corporation,
Appellees.

Upon Appeal from the United States District Court
for the Western District of Washington
Northern Division

PETITION FOR RE-HEARING OR
HEARING EN BANC

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MAR 24 1955

PAUL P. O'BRIEN

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PETITION FOR RE-HEARING OR HEARING EN BANC

On oral argument of this case at San Francisco on February 17, 1955, which was so interrupted, from time to time, by Presiding Judge Mathews, that both parties were unable to properly express their views. Judge Mathews stated that *the record had not been read, nevertheless* the opinion was orally expressed by him that the only *written order* from which this appeal was taken is an order denying the appointment of a temporary receiver. That was only *one* order. *There was another order in the handwriting of the district*

judge made on the face of our proposed findings and conclusions and signed by him which we believe constitutes a "Written order" denying *injunctive relief*. Aside from the "colloquay" referred to in the opinion (p. 4) that order reads:

"On the 30th day of July 1954 the foregoing requested findings of fact and conclusions of law were tendered for approving and entering to the undersigned judge who respectfully declined to approve, make or enter the same (signed John C. Bowen, Judge)"

This will be found in the record at page 40 (15) and is quoted in full at page 39 of our opening brief.

An examination of the record will show that these proposed findings are adequately supported by the undisputed evidence in the case. This is spelled out in detail at pages 38 and 42 of our opening brief, with appropriate references as to where the evidence in support of the respective proposed findings will be found in the record.

It is true there was no request for, nor any mention of injunctive process or injunctive relief in the motion for an order to show cause or in the order to show cause itself but the motion for the show cause order which was based on the complaint constitutes a pleading—which show cause order was answered by appellees who themselves brought into the hearing the tribal court judgment based entirely on the allegations

of the *amended* complaint. This Tribal Court judgment pleaded for the first time in the amended complaint was admitted on the hearing of the order to show cause. By the provisions of Rule 15(b) Rules of Civil Procedure the pleadings were deemed amended to conform to the proof. This court has recognized that rule. In *Nester v. Western Union*, 196 F 2d 587, cited at p. 48 of our opening brief. The conclusion reached by this honorable court that:

“... the *oral statement* that all requests for interlocutory injunctive relief were denied *were meaningless.*”

is therefore hardly correct when considered in connection with the handwritten refusal of the district court to make a finding concerning the tribal court judgment. (R 40 (15)).

In the footnote at page 2 of the opinion it is stated: “The order of July 30, 1954 was a *written order* filed and entered on that date.”

The endorsement of refusal to enter our proposed finding and conclusion was also a written order. It is in the handwriting of the district judge and was made the same date as the typewritten order and bears the signature of the district judge.

At the time of oral argument Judge Mathews expressed the opinion that *no issue with respect to the Tribal Court judgment (Ex. 4) was raised by appel-*

lees until the answer was filed on August 24, 1954. According to the record that is not correct.

The return to the order to show cause was *made and filed after the filing and serving of the amended complaint* which pleaded the tribal court judgment, and long before the belated answer was filed.

Appellees return to the order to show cause is contained in the affidavit of Tandy Wilbur, Sr. (R. 146). That affidavit brought in issue the tribal court judgment which we sought to have enforced. This is what that return states:

“The Swinomish Indian Court has jurisdiction in civil matters only to hear suits wherein the defendant is a member of the tribe and non-members when brought on by stipulation. The Indian Tribal Community never submitted to the jurisdiction of the Sminomish Indian Court, and at all times contended and still does contend that such court does not have jurisdiction to hear disputes between different tribes, that is, does not have jurisdiction to hear the claim of the plaintiff herein on behalf of the Swinomish Tribe of Indians against the Swinomish Tribal Community. The Swinomish Indian Tribal Community is not a member of itself, but a separate organization. There was no stipulation that the matter could be heard by the Swinomish Court.” (amended affidavit of Tandy Wilbur, Sr., dated June 10, 1954—R. 146.)

This part of the affidavit, filed as a return to the show cause order, *was in response to nothing but the allegations of the amended complaint, which pleaded*

the tribal court judgment two months before appellees answer to the amended complaint was filed.

The *prayer* of the *amended* complaint is:

1. That an order be entered herein, directing the defendants to *forthwith comply with the judgment of the tribal court* entered on the 8th day of July 1953.
2. *Enjoining defendants* and each of them, or said corporation from *exercising any control whatever over the property owned by the Swinomish Tribe.*"

Quite properly then, the district court received evidence *on that issue* and was in duty, bound to make a finding with respect thereto which he "respectfully declined to approve, make or enter * * *" (R. 40 (15))

Injunctive relief was sought and prayed for in the *amended* complaint, and as stated in our opening brief (p. 47) the return by defendants, in affidavit form, to the order to show cause *injected the issue of the validity of tribal court judgment* (Ex. 4). See affidavits of Tandy Wilbur (R. 146) even though *not referred to in the motion for or the order to show cause*. All parties, including the district judge, treated the motion and order to show cause as amended *by the amended complaint*. Evidence was offered and admitted concerning *this tribal court judgment* (Ex. 4 Tr. p. 71—Opening brief—pp. 26 and 27). All parties, including the district judge, treated this motion and

order to show cause *amended to conform to the proof* in accordance with the well recognized rule (Rule 15(b) and under the decisions of this honorable court, set out at pp. 48½ and 49 of our opening brief.

This court assumed that because the answer of appellees was not filed until after the order of refusal of a finding on the issue as to the validity of the tribal court judgment the tribal court judgment was not before the district court.

That assumption is *incorrect*. The issue was brought about by appellees return to the order to show cause by Tandy Wilbur, Sr. The specific language used being:

“The Indian Tribal Community never submitted to the jurisdiction of the S w i n o m i s h Indian Court.”

Of course, this is refuted by the documentary evidence attached to the deposition of Raymond Bitney (R. 222-232).

It is stated in the opinion filed February 28, 1955—eleven days after oral argument—that: “The complaint prayed that appellees be removed from office and required to account for all funds coming into the corporation’s possession since 1948 and *for all funds collected by appellees for the sale of timber belonging to the tribe or its individual allottees.*” Neither the

original or the *amended* complaint made particular mention of the sale of timber. Both related to ownership of fish traps, oyster beds and saw-mill properties, which were ordered by the Tribal Court returned to the tribe—the sale of the timber was only incidental.

The opinion in this case sets up a “straw-man” and then proceeds to knock him down, by the process of treating the show cause order as based on the allegations of the original complaint alone when in fact, the return made by appellees to the order to show cause brought in issue the additional allegations contained in the *amended complaint which does pray for injunctive relief*. In the affidavit of Tandy Wilbur (R. 146) the appellees themselves *injected the issue of the validity of the tribal court judgment* in the words set out at p. 6 hereof.

The documentary evidence in the form of an exemplified copy of the tribal court judgment having been admitted in evidence (Ex. 4), the motion for the order to show cause and the order to show cause itself are, under repeated decisions of this court set out at pages 48½ and 49 of our opening brief, deemed *amended to conform to the proof*.

In the footnote 3, page 3, of the opinion it is stated: “Furthermore, the hearings of June 7, June 11, July 15, July 27 and July 30, 1954, were hearings on the order to show cause and were not hearings on the amended complaint, *nor was the amended*

complaint mentioned in the order appealed from."

The italicized portion of the above quotation is precisely what appellant is complaining about on this appeal because the allegation of the amended complaint concerning this tribal court judgment (R. 26, 27), was made an issue by appellees, proof of which was offered and admitted (Vol. 1, p. 68) and a certified copy of the judgment was admitted in evidence as Ex. 4 (Tr. Vol. 1, p. 75).

Although requested by appellant the district court in his own handwriting and over his signature "*respectfully declined to approve, make or enter*" a finding or conclusion in respect to the tribal court judgment and order (R. 40 (15)).

This is covered by our assignment of error (or point on appeal) numbered IX (R. 40 (21) (Opening brief p. 44)).

It is a rule of universal application that a trial court make findings of fact on *all matters in issue*.

Mayo v. Lakehead Highlands Canning Co., 308 U.S. 310, where it was held that a full and fair compliance with this rule is of the highest importance to a proper review of an order granting or *refusing* a preliminary injunction.

This court in *Pacific American Fisheries v. Mul-*

laney (1951), 191 F. 2d 137, made a similar ruling.

This the district court did not do. A request must be made in the trial court for additional findings. This we did, in our proposed findings which were *refused in writing* (R. 40 (15) over the signature of the district judge.

Therefore, to say that because the hearings on June 7, June 11, July 15, July 27 and July 30, 1954 were hearings on the order to show cause and were not hearings on the amended complaint, nor was the amended complaint mentioned in the order appealed from is substituting form for substance.

In territorial days, this precise question arose in 1882 in the case of *Eakim v. McCraith et al*, 2 Washington Territory Reports 112. Chief Justice Greene, speaking for the territorial court, First Judicial District, sitting at Walla Walla in the then Territory of Washington said:

“The Judge’s findings of fact are so meager, that they *do not cover all of the material issues made by the pleadings*. His conclusion of law, therefore, does not flow as a logical sequence from the facts found. But if advantage was to be taken of this, there should have been a motion addressed to the court below to make additional findings to *meet the omitted issues*.”

The appellant did request a finding on the issue of the tribal court judgment, a certified and exemplified

copy of the tribal court judgment was admitted in evidence as Ex. 4 (Tr. p. 71).

The validity or invalidity of the tribal court judgment is only one phase of the case and poses nothing but a pure question of law, the fact of its entry being conceded, but its *validity only* being questioned.

The other phase of the case has to do with an accounting and is therefore the part of the case dealing with facts, which can only be determined after a trial on the merits. The accounting poses questions of fact. An accounting of course, just as the district court stated, will consume considerable time. The legal phase must be determined at the outset before an accounting can be ordered and that involves the legal question as to whether or not this tribal court judgment is entitled to full faith and credit in the United States Courts.

The findings which the trial court was requested by appellant to make and which he, in writing refused to approve or enter, are as follows:

“That certain industries are located on the Swinomish Reservation, to-wit: fish traps, oyster beds and a saw-mill and at La Conner, Washington, adjacent to the said reservation, a plant for the processing of oysters, which has not been operated since early in 1952 because of the failure of the Swinomish Tribal Community to comply with the regulations of the Washington State Department of Health by making changes and alterations in sanitation in said plant in order

to comply with said State sanitary regulations, all of which industries have been operated by the Swinomish Indian Tribal Community.” (proposed finding VI—R.. Vol. 3, p. 8).

(This proposed finding is supported by the affidavit and testimony of Martin J. Sampson (Tr. pp. 81 R. 65, 66) and the affidavits of Mondalla (R. 102) and Girard (R. 71).

“The court finds from the evidence that in 1951 a controversy arose between the Swinomish Tribe of Indians and the defendants herein constituting the Senate of the Swinomish Indian Tribal Community, a corporation, as to the ownership of the several industries being operated by said corporation, and an action was instituted in the Tribal Court and a hearing was had at which evidence was adduced after which the judge of the tribal court determined that the industries operated by the Swinomish Indian Tribal Community were owned by the Swinomish Tribe of Indians and on July 8, 1953, said Tribal Court made and entered an order and judgment requiring the Swinomish Indian Tribal Community to *‘immediately return to and turn over all property, monies wheresoever held, books of account, records to the council of the Snohomish Tribe.’*

“The court further finds that no appeal was taken by the Swinomish Indian Tribal Community although appeal procedure is provided for in the tribal code.” (R. Vol. 3, p. 8).

(This proposed finding is supported by a certified copy of the judgment in evidence as Exhibit 4, the deposition of Raymond H. Bitney, Superintendent Western Washington Indian Agency (R. 222-233) and

is admitted by appellees in the affidavit of Tandy Wilbur Sr. (R 146) who merely claims lack of jurisdiction in the tribal court to enter such judgment).

This is all fully set out at pages 39, 40 and 41 of our opening brief.

If it can be judicially said that the endorsement by the District Court *in his own handwriting and over his signature* on the same day and at the same time he signed the *typewritten order on the 30th day of July 1954 is not a refusal after a request*, to make a finding on one of the issues litigated then, of course such endorsement, to use the language of Judge Mathews with respect to the district court's *oral ruling* which the court is pleased to term "colloquay" then this writing by the district court, in his own hand-writing over his signature is "meaningless."

We do not believe it is meaningless' and on reconsideration, we do not believe this court will say so.

This *refusal*, we submit, requires a careful examination of the record, and if, upon such examination of the record it is found that this tribal court judgment *was* in issue on the several hearings on the order to show cause, then the district court was required under the rule to make a finding one way or the other on that issue. Failure to do so constitutes error and requires reversal—not dismissal of the appeal.

Under all authority it was error for the district court to refuse to do so and the case should at least be remanded with directions to make a specific finding on that issue instead of dismissing the appeal.

The purpose of Rule 52 (a) is to make definite just what is decided by the case in order to apply the doctrines of estoppel and res judicata in future cases. *Nordby* 1 Frd, 25. See also Advisory Committee note to amendment to Rule 52 (a).

The typewritten order of July 30, 1954 disposed of only one phase of the relief sought—the denial of the receivership sought solely *because of the emergency*—the approach of the fishing season to prevent further dissipation of the earnings of the fish traps. (See affidavit attached to motion) which it is well known is not appealable and does not require findings, while the *handwritten* order bearing the same date and signature of the judge *refusing* the proposed or a substitute finding concerning one of the vital issues in the case—the tribal court judgment—which constituted the only phase of the case from which appeal to this court is authorized (is appealable).

Because this refusal was not included in the typewritten order although requested by appellant and was dealt with in the handwriting of the district judge in a separate document—our proposed finding—it seems

to us is substituting form for substance. *The notice of appeal was from the order denying injunctive relief*, which in effect is what the district court did by his endorsement in his own handwriting and over his signature on the proposed finding and conclusion of law which he “respectfully declined to approve, make or enter.”

As said by this court in *United States v. Foster* (9 Cir. 194) 123 F 2d 32:

“An appellant seeking to overthrow the findings has burden of presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor.”

This, we respectfully submit, we have done as an examination of the record will clearly show.

And as pointed out in our assignments of error the findings made by the district court that the corporation is the owner of and entitled to the beneficial use of these seasonal industries is clearly erroneous, in the light of the tribal court judgment.

This court has held that Rule 52 (a) permits the unsuccessful party to raise on appeal the question of the sufficiency of the evidence to support findings whether or not the party raising the question has made in the district court an objection to such finding *or has made a motion to amend or motion for judgment.*

Bingham Pump Co. v. Edwards (9 Cir.) 118 F

2d, 338 certiori denied 62 S Ct. 107, 314 US 656, 68 L Ed. 525.

Monaghan v. Hill (9 Cir.) 1944, 140 F 2d. 31.

In re Imperial Irr. Dist. 38' F Supp. 770, affirmed 136 F 2d. 539 (cert. den, 64 S Ct. 184, 321 US 787, 88 L Ed. 1078 re-hearing den. 64 S Ct. 940, 322 US 767, 88 L Ed. 1593.

“An objection in the appellate court which would dispose of a cause upon a technicality in pleading is not to be favored in view of Rule 8 (f) and 15, especially where if the objection had been made below, the plaintiff might have amended his complaint so as to obviate the objection.”

Mitchell v. Wright (9) Cir. 1946 154 F 2d. 925.

This show cause order was not heard on oral testimony, but on *affidavits*. In such a case this court held that the reviewing court gives slight weight to the findings.

Equitable Life Assur. Soc. of U.S. v Irelan (9 Cir.) 1941—123 F 2d. 462.

For the reasons herein set forth and to prevent a miscarriage of justice we earnestly and respectfully petition this honorable court for a reconsideration and rehearing or a hearing en banc on the record made.

Respectfully submitted,

MALCOLM STEWART McLEOD
and

JOHN E. BELCHER

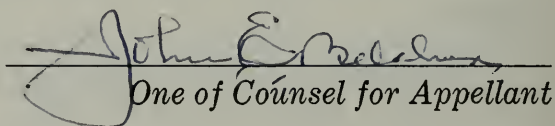
Attorneys for Appellant.

617 Dexter Horton Building
Seattle 4, Washington

Certificate

John E. Belcher, one of counsel for appellant hereby certifies that in his professional judgment this petition herein is well founded and that it is not interposed for delay, but to prevent a miscarriage of justice.

Dated this 11th day of March, 1955.


One of Counsel for Appellant

United States Court of Appeals
For the Ninth Circuit

MARTIN J. SAMPSON, as Chief of the Swinomish Tribe of
Indians, etc., *Appellant,*

vs.

JOSEPH JOE, *et al.*, as members of the Senate of Swin-
omish Indian Tribal Community, a federal corpora-
tion, *Appellees.*

APPEAL FROM ORDER OF THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION, DISCHARGING ORDER TO
SHOW CAUSE
HONORABLE JOHN C. BOWEN, *Judge*

ANSWER BRIEF ON BEHALF OF APPELLEES

HARWOOD BANNISTER
and
WARREN J. GILBERT
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Mount Vernon, Washington

FILED

OCT 30 1954

PAUL P. O'BRIEN,
CLERK

United States Court of Appeals For the Ninth Circuit

MARTIN J. SAMPSON, as Chief of the Swinomish Tribe of
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United States Court of Appeals

For the Ninth Circuit

MARTIN J. SAMPSON, as Chief of the Swinomish Tribe of Indians, etc., *Appellant*,

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JOSEPH JOE, *et al.*, as members of the Senate of Swinomish Indian Tribal Community, a federal corporation, *Appellees*.

No. 14538

APPEAL FROM ORDER OF THE DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION, DISCHARGING ORDER TO
SHOW CAUSE

HONORABLE JOHN C. BOWEN, *Judge*

ANSWER BRIEF ON BEHALF OF APPELLEES

STATEMENT RELATIVE TO JURISDICTION

Appellees contended in the District Court and contend here that this action is not one within the jurisdiction of a Federal Court.

Appellant in his jurisdictional statement fails to set forth the pleadings and facts disclosing the basis upon which it is contended the District Court had jurisdiction and the Circuit Court has jurisdiction. The Appellant makes no reference to any treaty of the United States, or statute, the validity of which is in question or to any pleading necessary to show the existence of jurisdiction. Rules of the United States Court of Appeals for the Ninth Circuit, Rule 18, 2(b).

Whether an action is within the jurisdiction of a Fed-

eral Court is open to question at any time. Federal Rules of Civil Procedure, Rule 12(h); *Neirbo Company, et al., v. Bethlehem Shipbuilding Corporation, Ltd.* (1939) 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167; *Miller v. First Service Corp.* (CCA 8th 1936) 84 F.(2d) 680.

The principal contention of appellant, as it appears from his brief and Amended Complaint, is that he is entitled at this time to a mandatory injunction based upon a purported judgment of the Swinomish Indian Court and ultimately to the relief provided by said purported judgment. Whether such judgment is entitled to full faith and credit does not involve the interpretation of any United States Constitutional provision nor any law or treaty of the United States. *Gold-Washing and Water Co. v. Keyes* (1878) 96 U.S. 199, 29 L.Ed., 656.

As disclosed by his Amended Complaint (R. 1) Plaintiff claims ownership of the assets upon the Swinomish Indian Reservation. Title to the real property is vested in the United States Government for the benefit of all Indians who were parties to the Treaty of Point Elliott (12 Stat. 928); *United States v. Stotts* (1930) 49 F.(2d) 619; Defendants' Exhibit A-1 (Tr. Vol. 2, 22). Appellant's dispute is with the United States Government and not with these appellees.

Whether a receiver should be appointed does not involve a Federal Question.

No rights of a Federal nature are at issue herein. *Security First National Bank of Los Angeles v. Republic Pictures Corp.* (D.C. Calif. 1951) 97 F. Supp. 360.

The action of appellant should be dismissed.

STATEMENT OF CASE BY APPELLEES

Appellees controvert the preliminary statement and the statement of the case made by appellant. The evidence establishes the following as the facts.

By the Treaty of Point Elliott, 12 Stat. 928, various tribes of Indians ceded to the United States the lands therefore occupied by them. By Article Two of the Treaty there was reserved to the Indians four reservations, one of which was designated as "the peninsula at the Southeastern end of Perry's Island called Shais-Quihl." The four tracts so set apart were reserved for the exclusive use and occupancy of all of the Indians who were parties to the Treaty of Point Elliott. No particular tract was reserved for any particular tribe. The Swinomish Tribe was a party to said Treaty and ceded all its land to the United States. Treaty of Point Elliott 12 Stat. 928. See Defendants' Exhibit A-1 (Tr. Vol. 2-22).

By Article Four of the Treaty of Point Elliott the "said tribes and bands agree to remove to and settle upon the first above mentioned reservations (as set out in Article Two) within one year after the ratification of this Treaty, or sooner, if the means are furnished to them." There moved upon the reservation designated as the Southeastern end of Perry's Island Indians of the then existing tribes of Swinomish, Samish, Skagit, Kikiallus and others. This area became known as the Swinomish Reservation.

The actual area of the Swinomish reservation was delimited by executive order dated September 9, 1873. See Indian Affairs, Laws and Treaties, Vol. 1, Page 925, U.S.

Government Printing Office 1903. The head note indicates that the Swinomish Reservation is in the Tulalip Agency and occupied at that time by Dwamish, Etakmur, Lummi, Snohomish, Sukwamish and Swinomish.

Substantially all the land on the reservation has been allotted, a considerable part to Indians of various tribes other than the Swinomish Tribe. See Affidavit of Tandy Wilbur, Sr. (R. 184, 193-196); Plaintiff's Exhibit 16 (Tr. Vol. 2-152). Of seventy allottees the Swinomish Indians numbered twenty-three or approximately one-third, the balance of the allottees were from the aboriginal tribes of Skagit, Samish, Kikiallus, Snohomish, Snoqualmie and Twa-za-hub.

About 1928 the Indians residing on the Swinomish reservation organized what was known as the Swinomish Tribal Council, such organization being affected by practically all of the Indians residing on the Reservation (testimony of Wilfred Steve, reporter's transcript of testimony, Vol. 2, Page 10). The first members of the council were from the following tribes of Indians; Kikiallus, Lower Skagit, Swinomish, and Samish, being elected by the Indians residing upon the Swinomish reservation (see reporter's transcript of testimony of Plaintiff, Vol. 1, Pages 116-118).

In 1936 the Indians, who as a matter of right, were residing on the Swinomish reservation organized the corporation known as the Swinomish Indian Tribal Community, a federal corporation (Constitution and By-Laws, Tr. Vol. 1-2-50; Corporate Charter Tr. Vol. 1, 68). This organization is in fact the defendant in this action. Power to hold, manage and control the assets of

the Swinomish reservation is vested in the Tribal Community (Constitution and By-Laws and Corporate Charter Plaintiffs' Exhibits 14 and 15 (Tr. Vol. 1, 2-50; Vol 1, 68).

From the time of the formation of the corporation to 1949 all corporate funds were handled by the Western Washington Indian Agency at Tulalip, Washington. During the period the Plaintiff was chairman of the Senate (1938-1940) gross revenue from the operation of the fish traps was as follows: 1938—\$11,102.58; 1939—\$1,299.38; 1940—\$9,709.80. See Supplemental Affidavit of Tandy Wilbur, Sr. (R. 169 at 184-185). Through proper management the Swinomish Indian Tribal Community continued to grow so that at the end of 1952 its consolidated balance sheet showed capital and surplus of \$272,890.04 and gross revenue from business and other activities of the Tribal Community during the year 1952 in the amount of \$203,206.79. See Plaintiff's Exhibit 6 (Tr. Vol. 1, 2-50) Compare Plaintiff's Exhibit No. 5 (Tr. Vol. 1, 2-50).

The business and affairs of the corporation are managed by a board of eleven Senators elected and qualified in accordance with the provisions of the Constitution and By-laws.

A law and order code was adopted for the Indians residing on the Swinomish Reservation and a court of inferior and very limited jurisdiction was established. Plaintiff's Exhibit 3 Tr. Vol. 1, 68). A purported judgment of the Swinomish Indian Court was entered July 8, 1953, enjoining the Swinomish Indian Tribal Community from carrying on or transacting business or af-

fairs for the Swinomish Tribe. Plaintiff's Exhibit 4 (Tr. Vol. 1, 68). The validity of such judgment is denied by the Appellees as the Swinomish Indian Court has no jurisdiction over the subject matter or the party in interest in the action on which the purported judgment was founded. See Amended Affidavit of Tandy Wilbur, Sr. (R. 144, page 146). The Judge of the Swinomish Indian Court is a party in interest to the action being a member of the Swinomish Tribe. See Affidavit of George McLeod dated June 10, 1954 (not indexed but No. 14 on Appellant's designation of record of appeal (R. 40 (19))). In any event the Appellees have been carrying on the business affairs and handling the property of the Swinomish Indian Tribal Community, a federal corporation, and have not been carrying on or transacting any business or affairs for the Swinomish Tribe.

Plaintiff, about May 13, 1954, filed his Complaint in the United States District Court for the Western District of Washington praying that the present Senate of the Swinomish Indian Tribal Community be removed and a new election ordered and that there be an accounting. At the time of filing his Complaint the Plaintiff secured the issuance of an Order to Show Cause (R. 21), requiring the Appellees to show why they should not, pending a trial on the merits, turn over the temporary management of the enterprises on the Swinomish Reservation to the council of the Swinomish Tribe of Indians or that a Receiver be appointed, such request being based on alleged malfeasance and misfeasance and mismanagement. See Appellant's Brief, Page 47, lines 10-13.

Appellant, thereafter, filed his amended Complaint (R. 1) praying that the Appellees comply with the purported judgment of the Swinomish Indian Court and that an Order be entered enjoining the Appellees from exercising any control over the property on the Swinomish Reservation and that there be an accounting.

Appellees moved to strike, make more definite and certain and to elect (R. 25) and to dismiss, (R. 23) which motions were heard subsequent to the hearings on the Motion to Show Cause and were denied (R. 40) (7).

Two hearings on the Order to Show Cause were had at Seattle and the cause was then transferred to Bellingham upon motion of the Appellees where further hearings were held.

The evidence contained in the record on appeal was introduced at the hearings held upon the Order to Show Cause and was all directed at the need for an appointment of Receiver on the grounds of alleged malfeasance, misfeasance and mismanagement of the present Senate. After considering all of the evidence and hearing the argument of counsel, the Court orally ruled that the Order to Show Cause be discharged without prejudice to the authority of the Court to determine the action on the merits at a later time (Journal entry R. 131 (a) (b)).

Appellant filed a motion for reconsideration of the Court's oral decision (R. 28).

On July 27, 1954, the Court requested counsel to prepare Findings of Fact and Conclusions of Law in accordance with the Court's previously announced oral

decision. Reporter's Transcript of Testimony, Vol. 2, pages 33-34.

On July 30, 1954, the Court, after argument, orally denied Appellant's motion for reconsideration of oral decision and entered the Findings of Fact and Conclusions of Law and Order Discharging Order to Show Cause (R. 40 (1), (3)). An order *nunc pro tune* was entered denying appellant's motion for reconsideration (R. 40) (7).

Appellant gave notice of appeal to the Circuit Court (R. 40 (16)).

SUMMARY OF ARGUMENT

The argument of the Appellees, aside from answering various contentions raised by the Appellant in his argument, is based upon the following points:

1. The only issue before the District Court was whether or not a Receiver should be appointed and the finding of the trial court on that is supported by the evidence.

2. The merits of a controversy are not to be litigated upon an Order to Show Cause.

3. An action on a foreign judgment is a new and independent action to be tried as any civil action.

ARGUMENT

Appellees appeared in Court pursuant to an order directing them to show cause why they should not turn over the temporary management of the enterprises on the Swinomish Indian Reservation to the Council of the Swinomish Tribe of Indians until a new election could be held of the Swinomish Indian Tribal Community Senate or in the alternative that a receiver be appointed to take possession of the enterprise and conserve the same pending a trial on the merits of Plaintiff's Complaint (R. 21-22).

The appointment of a Receiver is a harsh remedy and relief will be granted only in a clear case. *United States v. Honolulu Consolidated Oil Company* (1918) 249 Fed. 167. See also *Strickland v. Peters* (1941) 120 F.(2d) 53.

A receiver will be appointed only on a plain showing of some loss or injury to the property which the receivership could avoid. *Garden Homes, Inc. v. U.S.* (1952) 200 F.(2d) 299.

Appellant, in his brief, spends little time on this phase of the case. See Appellant's brief, pages 28-36. While Appellees do not believe that a recitation of the evidence is necessary some reference thereto is necessary.

Appellant relies mainly upon the testimony of Mr. R. H. Kendall. The suggestion in Appellant's brief contained on Page 28 thereof, that Mr. R. H. Kendall lost his job because he testified on behalf of the Plaintiff is without basis. See Supplemental Affidavit of Tandy Wilbur, Sr. (R. 169 at Page 190). A considerable portion of the testimony of Mr. Kendall dealt with matters

with which the present Senate was not concerned. Page 33 of Appellant's brief contains a heading "Shortages in Funds." The shortages, if any, exist in the Western Washington Indian Agency office and not in the Swinomish Indian Tribal Community accounts handled by the present Senate. As Mr. Kendall stated it was for the Western Washington Agency to clarify (See Plaintiff's Exhibit No. 11, Tr. Vol. 1, 2-50).

At the time of preparing the financial statements introduced in evidence herein as Plaintiff's Exhibits Nos. 5 and 6 the witness R. H. Kendall had the following to say:

"PURPOSES AND ACTIVITIES

"The obvious primary purpose in the formation of the corporation was to provide a permanent legal entity as the means of community welfare and betterment, free of the necessity for continual assistance grants. This purpose has been well served, despite many handicaps." (Plaintiff's Exhibit No. 6, page 9; Tr. Vol. 1, 2-50).

and also:

"Despite the starting handicaps of lack of capital, and lack of executives trained in commercial financing and managing, the corporation has steadily built itself up to its present scope of operations. The fishing industry, and oyster bed and sawmill are now operated by the corporation. In addition to providing commercial employment for its members (1948 payroll \$53,468.88) it provided its members with inexpensive housing, considerable supplies of food, and extensive recreation and community activity including community policing and government and from its own funds, considerable assistance to its members for commercial purposes,

education, and emergency financing.” (See Plaintiff’s Exhibit No. 5, page 2; Tr. Vol. 1, 2-50).

Appellant’s evidence of mismanagement was all controverted by the Appellees, a considerable portion of the evidence on behalf of the Appellees coming from distinterested witnesses.

The District Court after having very carefully considered and re-considered the evidence entered Findings of Fact and Conclusions of Law (R. 40 (3)). Number Five of said Findings reads as follows:

“There has been no showing made at this time that there has been or is threatened any loss or injury to the property which is the subject matter of this action which would be avoided by the appointment of a Receiver herein pending a trial of this matter on the merits.” (Tr. Vol. 2, Pages 36-37, 53).

Such finding is not to be set aside unless clearly erroneous. Federal Rules of Civil Procedure, Rule 52.

There being no showing that a receivership could avoid any loss or injury to the property the Court correctly ordered the discharge of the Order to Show Cause. *Garden Homes, Inc. v. U. S.* (1952) 200 F.(2d) 299.

The object of the action by the Plaintiff is to secure for himself and the Swinomish Indian Tribe all of the assets on the Swinomish Indian Reservation. See Reporter’s Transcript of oral testimony of Plaintiff, Vol. 1, Page 150, lines 3-6. Appellant claims ownership based upon aboriginal title. See Appellant’s brief, Page 45-47. He also claims it by reason of the purported judgment

of the Swinomish Tribal Court (see Amended Complaint (R. 1)).

Ownership of the real property including tidelands is vested in the United States for the benefit of all of the Indians residing upon the Swinomish Indian Reservation. Treaty of Point Elliott (12 Stat. 928). *United States v. Stotts* (1930) 49 F.(2d) 619. The Appellant recognizes that the Swinomish Tribe of Indians does not have ownership of the land or tideland of the Swinomish Reservation. The Appellant, purporting to be Chief of the Swinomish Tribe of Indians, verified a Petition filed before the Indian Claims Commission in which damages are asked from the United States Government for the taking of the property held aboriginally by the Swinomish Tribe of Indians. Defendants' Exhibit 1 (Tr. Vol. 2, 22).

Appellant suggests there can be no transfer of said property rights by implication. The Appellees were specifically given the right to manage and control the assets upon the Swinomish Reservation. See Plaintiff's Exhibits Nos. 14 and 15 (Tr. Vol. 1, 2-50, Tr. Vol. 1, 68).

Article Four, Section 1, subsections c and f, vests in the Senate of the Swinomish Indian Tribal Community the power to manage and control the Tribal lands and Tribal assets and to manage all economic affairs and enterprises of the Swinomish Reservation (Plaintiff's Exhibit 14, Tr. Vol. 1, 2-50).

It is also provided in Article 8, Section 2, of the Constitution and By-laws (Plaintiff's Exhibit No. 14), that the unallotted lands and lands thereafter acquired should be Tribal Lands held for the benefit of the Com-

munity and section 3 of the said Paragraph 8 provides that the Senate shall have the power to lease the community lands.

Section 7 of the corporate charter (Plaintiff's Exhibit No. 15; Tr. Vol. 1, 68) provides that the community ownership of unallotted lands is expressly recognized.

These provisions, both in the charter and in the Constitution and By-Laws, establish the right of the Swinomish Indian Tribal Community, as a federal corporation, to hold the beneficial interest in all of the assets, including the interest in land and tidelands, for community purposes. The Plaintiff himself was chairman of the Election Board at the time the Constitution and By-laws were adopted and certified to the Adoption. Plaintiff's Exhibit No. 14, Tr. Vol. 1-2-50, Page 11 "Certificate of Adoption."

The foregoing support Findings of Fact 1 and II entered by the District Court (R. 40 (15)).

Plaintiff is attempting to litigate the merits of the controversy upon his hearing to show cause. Motions or orders to show cause cannot be available to settle important questions of law or to dispose of the merits of the case. 37 Am. Jur. Page 503, Motions, Rules and Orders, Section 3; *Illinois C. R. Company v. Adams* (1901) 180 U.S. 28, 21 S.Ct. 251, 45 L.Ed. 410.

The court entered Finding of Fact No. III reading as follows:

"The ownership of and the right to the beneficial interest in the various property and assets on the Swinomish Reservation is claimed by the Plaintiff

in a representative capacity and is claimed by the Swinomish Indian Tribal Community, a federal corporation, and it likely will require many days to try such conflicting issues in Court.” (R. 40 (15)).

As the ultimate object of the action is to determine ownership of the assets, it is obviously a matter to be tried upon the merits. Such matter as a receivership and preliminary injunction cannot *per se* be the subject of a suit in equity. *DeReese v. Costogula* (CCA N.Y. 1921) 275 Fed. 172.

Appellant bases his claim for injunctive relief upon the purported Judgment of the Swinomish Tribal Court. There was no issue raised by the Order to show cause concerning the purported judgment of the Swinomish Indian Court. The Appellees at all times objected to the introduction of the purported judgment as immaterial to the issues presented upon the hearing. (Reporter’s Transcript of testimony, Vol. 1, 72-75).

The appellant assumes that the District Court in requesting Findings pursuant to the provisions of Rule 52 had in mind injunctive relief enforcing the purported judgment of the Swinomish Indian Court. See Appellant’s brief, page 27, page 50.

Such assumption is entirely unwarranted.

The words “interlocutory injunction” found in Rule 52 are of very general meaning and it is more logical to assume the Court meant that the appointment of a receiver was in the nature of an interlocutory injunction.

Assuming the validity of the judgment entered by the Swinomish Indian Court it can stand no higher than a foreign judgment. *Cornelious v. Shannon* (1894)

63 Fed. 305. As such it constitutes only a claim or some evidence of ownership or right to possession. The District Court by its Finding of Fact III (R. 40 (15)) found that ownership of and the right to the beneficial interest in the subject matter of this action is in dispute and a matter to be tried upon the merits. The Court did, therefore, make a finding of an ultimate fact with respect to the Swinomish Indian Court judgment.

Plaintiff's position, as evidenced by his argument, is that he is seeking to execute the judgment of the Swinomish Indian Court by a mandatory injunction out of the United States District Court.

Whether the purported judgment of the Swinomish Tribal Court is entitled to full faith and credit is open to question. See *Baldwin v. Iowa State Traveling Men's Association* (1931) 283 U. S. 522, 51 S.Ct. 517, 75 L.Ed. 1244.

The judgment of the Swinomish Indian Court if it be a foreign judgment, gives to the Appellant only a new and independent cause of action to be tried in the District Court as any civil action. *Indemnity Ins. Co. of N. A. v. Smoot* (1945) 152 F.(2d) 667; Cert. denied 328 U. S. 835, 66 S.Ct. 981, 90 L. Ed. 1611. Being a new cause of action it is subject to the same rules as any cause of action. For procedure see *Springs et al. v. James* (1909) 172 Fed. 626.

Whether the judgment of the Swinomish Indian Court is entitled to full faith and credit is open to judicial inquiry. The Appellees have denied that the Swinomish Indian Court had jurisdiction of either subject matter or persons of the Appellees. *Chicago Life Ins. Co. v. Cherry* (1917) 244 U.S. 25, 37 S.Ct. 492, 61 L.Ed.

966. See also 31 Am. Jur. page 138 *et seq.*, Judgments, Sections 530 *et seq.*

Appellants' references to collateral attacks on judgment are not in point.

Appellant makes eleven points on appeal. Insofar as these assign as error the entering of Findings of Fact by the District Court the evidence preponderates in favor of such findings and the Appellant has failed to sustain the burden imposed upon him by Rule 52, Federal Rules of Civil Procedure to show that such Findings are clearly erroneous.

The conclusions of law following from the Findings of Fact and Appellant has not and cannot show where the Conclusions of Law are in error.

The remaining points assign as error the failure of the District Court to enter the proposed Findings and Conclusions of Appellant, and the Failure to give full faith and credit to the Swinomish Indian Court. The lower Court considered the Findings of Fact and Conclusions of Law submitted by the Appellant and declined to enter the same (R. 40 (15)). Many of the Findings proposed by the Appellant were on matters which are to be determined on the merits of this case and not upon the hearing on Order to Show Cause.

The Judgment of the District Court should be affirmed.

Respectfully submitted,

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